Oct. 31. 78. Argd. N. H. Swayne

7 Otto 652

Oct. T. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~309.~~ 57

HARLOW BARNEY, PLAINTIFF IN ERROR,

vs.

J. N. DOLPH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED NOVEMBER 13, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 309.

HARLOW BARNEY, PLAINTIFF IN ERROR,

vs.

J. N. DOLPH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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a At a supreme court begun and held at the court-room in the city of Salem, in and for the State of Oregon, on Monday, the 14th day of December, A. D. one thousand eight hundred and seventy-four, before the Hon's B. F. Bonham, chief justice, L. L. McArthur, P. P. Prim, E. D. Shattuck, and John Burnett, associate justices, the following proceedings were had on Saturday, the 6th day of February, the same being the 36th judicial day of the term:

J. N. DOLPH, RESPONDENT,
vs.
HARLOW BARNEY AND W. HOLMAN, APPELLANTS.
} Appeal from Polk County.

Now, at this day came Boise and Sullivan, counsel for appellant, and E. C. Bronaugh, counsel for respondent, and this cause came on to be heard upon and in regard to all questions presented by the transcript.

After argument by said counsel the court, having duly considered the matters at issue, finds that there is not error as alleged.

It is therefore ordered and adjudged by the court that the judg-
b ment herein in the court below rendered be affirmed, that the cross-bill filed herein in the court below by appellants be stricken out, and that respondent is the owner in fee-simple of the undivided (⅝) five-eighths of the land described in the complaint herein in the court below filed, and that J H. Mitchell is the owner of the remaining three-eighths (⅜) of said tract of land as tenant in common with respondent, and that respondent is entitled as against appellants and each of them to the immediate possession of the whole of said lands and premises described in the said complaint.

It is therefore ordered and adjudged that respondent do have and recover of and from the appellants and each of them the immediate possession of the whole of said lands and premises described in the said complaint and in the judgment herein in the court below rendered, together with the costs and disbursements of this action in the court below.

c It is further ordered and adjudged that respondent have and recover of and from appellants and of and from W. Holman and S. W. Smith, sureties on appeal, his costs and disbursements in this court allowed, taxed at $77.25, and that execution issue for such costs and disbursements both in the court below and in this court taxed.

It is further ordered that this cause be remanded to the court below for such further proceedings as are in this order and by law required.

d STATE OF OREGON,
County of Marion, ss:

I, C. B. Bellinger, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Salem, Oregon, this 10th day of February, 1875.

[SEAL.] C. B. BELLINGER, *Clerk.*

In the supreme court of the State of Oregon.

J. N. DOLPH, RESPONDENT,
vs.
HARLOW BARNEY, APPELLANT.

Statement of costs and disbursements claimed by respondent in the above-entitled cause:

Trial fee	$6 00
Printing brief (currency)	35 50
Cost of transcript, paid by appellants	
Clerk's fees	20 75
Costs	
Attorney fee	15 00
	$77 25

STATE OF OREGON,
County of Marion, ss:

I, J. N. Dolph, being first duly sworn, say I am respondent in the above-entitled cause, and, except fees of officers, the disbursements set fort' above have been necessarily incurred by the respondent, who is entitled to recover the same from the

J. N. DOLPH.

Subscribed and sworn to before me this 9th day of February, 1875.
[SEAL.] JOSEPH SIMON,
Notary Public, Oregon.

(Indorsed:) Filed Feb. 10th, 1875. C. B. Bellinger, clerk.

1 In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PLAINTIFF,
vs.
HARLOW DARNEY AND W. HOLMAN, DEFENDANTS.

The above-named plaintiff, for complaint against the defendants above named, alleges that he, the plaintiff above named, is owner in fee-simple of the undivided five-eighths of all that tract or parcel of land situated in Polk County, in the State of Oregon, described as follows, to wit:

Commencing seven (7) chains and seventy links east and fifteen chains and fifty links south of the northeast corner of section sixteen (16), in township seven south, range five west of Willamette Meridian; running thence north nine chains and fifty links; thence west eighty-seven chains and fifty links; thence south forty-nine (49) chains and fifteen
2 links; thence east forty-seven chains; thence south thirty-nine chains and eighty-five links; thence east eighty chains; thence north eighty-chains; thence west thirty-eight chains and sixty-three links to the place of beginning, containing 912 acres, more or less.

That J. H. Mitchell is the owner of the remaining undivided three-eighths of said tract of land as tenant in common with plaintiff.

That plaintiff is entitled to the immediate possession of the whole of said tract of land.

That said defendants are jointly, wrongfully, and unlawfully in the possession of *of* the whole of said tract of land, and wrongfully and unlawfully withhold the same and every part thereof from the plaintiff, to plaintiff's damage in the sum of five hundred dollars.

Wherefore plaintiff prays judgment for the possession of said tract of land, and the whole thereof, as owner of the undivided five-eighths
3 thereof, as tenant in common with said J. H. Mitchell, the owner of the undivided three-eighths thereof, and to be adjudged the owner in fee of said undivided five-eighths thereof, and for five hundred dollars damages for the withholding of the same and for costs and disbursements.

E. C. BRUNAUGH,
C. A. DOLPH, and
JOSEPH SIMON.
Att'ys for Plaintiff.

STATE OF OREGON,
County of Multnomah, ss:

I, J. N. Dolph, the plaintiff in the above-entitled action, being first duly sworn, say that the foregoing complaint is true, as I verily believe.

J. N. DOLPH.

Subscribed and sworn to before me this 29th day of April, A. D. 1874.

[L. S.]

C. A. DOLPH,
Notary Public for Oregon.

4 (Indorsed:) In the circuit court of the State of Oregon for the county of Polk. J. N. Dolph, plaintiff, vs. Harlow Barney and W. Holman, def'ts. Complaint. Filed May 1st, 1874. D. J. Holmes, clerk, by R. L. Fraker, deputy.

5 *Summons.*

In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PLAINTIFF,
vs.
HARLOW BARNEY AND W. HOLMAN, DEFENDANTS.

To Harlow Barney & W. Holman, defendants:

In the name of the State of Oregon.

You and each of you are hereby notified and required to appear and answer the complaint filed against you in the above entitled action, in which J. N. Dolph is plaintiff and Harlow Barney and W. Holman defendants, within ten days from the date of the service of this summons upon you if served in this county, or, if served in any other county in this State, then within twenty days from the date of the service of this summons upon you. And if you fail so to answer, for want thereof the plaintiff will take judgment against you for the possession of the
6 lands described in the complaint, and for the sum of five hundred dollars damages for withholding the same, and for costs and disbursements.

E. C. BRUNAUGH,
C. A. DOLPH,
& JOSEPH SIMON,
Attorneys for Plaintiff.

DALLAS, *May 1st*, 1874.

STATE OF OREGON,
County of Polk, ss:

I hereby certify that I received the foregoing summons on the 1st day of May, A. D. 1874, and that I served the same on the within-named defendants Harlow Barney and W. Holman, by delivering to each of them in person a true copy thereof duly prepared and certified by me as sheriff, together with a copy of the complaint in the within-entitled action duly prepared and certified by C. A. Dolph, of plaintiff's attorneys of record in said action, within said county and State, on this the 1st day of May, A. D. 1874.

S. T. BURCH,
Sheriff of Polk County, Oregon,
By A. MILLER,
Deputy.

7, 8 (Indorsed:) In circuit court of State of Oregon for county of Polk. J. N. Dolph, plaintiff, vs. H. Barney & W. Holman, defendants. Summons. E. C. Brunaugh, C. A. Dolph, & Joseph Simon, pl'ff's attorneys.

9,10 In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PL'FF,
vs.
HARLOW BARNEY & W. HOLMAN, DEF'TS.

Now on this day comes the said defendant Holman, and for answer to the complaint of the plaintiff filed herein shows to the court the following facts:

1st. That he has no interest whatever in the premises described in the complaint on file in the above-entitled suit, save and except that he rented a portion of the same from the said def't Barney, about the first of November, 1873, for the term of two years, with the privilege of a third year, for the purpose of farming.

2nd. That he now occupies said premises under said lease as the tenant of the said Barney, and that said Barney then represented himself as the owner in fee of said premises, and defendant so believed.

11 Def't prays judgment for his costs and disbursements.

P. C. SULLIVAN,
Att'y for Def't Holman.

STATE OF OREGON,
County of Polk, ss:

I, W. Holman, being duly sworn, do depose and say that I am the def't above named, and that the foregoing answer is true as I believe.

W. HOLMAN.

Subscribed and sworn to before me this 2nd day of May, A. D. 1874.

D. J. HOLMES, *Clerk,*
By R. L. FRAKER, *Deputy.*

12 (Indorsed:) Dolph vs. Barney et al. Answer of Holman. Filed May 2, A. D. 1874. D. J. Holmes, clerk, by R. L. Fraker, deputy. Sullivan, for def't Holman.

13 In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PL'FF,
vs.
HARLOW BARNEY AND W. HOLMAN, DEFENDANTS.

Now comes the above-named defendant Harlow Barney, and demurs to the complaint of the said plaintiff, for the reason that the same does not state facts sufficient to constitute a cause of suit.

BOISE, HAYDEN, DALY, MYER and SULLIVAN,
Att'ys for Def't Barney.

14 (Indorsed:) Dolph vs. Barney et al. Demurrer. Filed May 2, 1874. D. J. Holmes, clerk, by R. L. Fraker, deputy. Boice et al., att'ys for Barney.

15 In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PL'FF,
vs.
HARLOW BARNEY AND HOLMAN, DEFENDants. } Action to recover the possession of real estate.

Now comes the above-named defendant Barney, and for answer to the complaint of the pl'ff filed in this cause denies that the said pl'ff, J. N. Dolph, is the owner in fee of five-eighths of the lands described in the said complaint of the said pl'ff, or any part thereof.

Denies that he, the said J. N. Dolph, is entitled to the possession of the said premises described in said complaint, or any part thereof.

Denies that the said pl'ff, Dolph, is damaged in the sum of five hundred dollars, or any other sum, in consequence of the wrongful withholding thereof by the def't.

Defendant denies that he wrongfully and unlawfully withholds the possession of the said premises from the said pl'ff, or any part
16 thereof, or that he is wrongfully in possession thereof.

Defendant denies that J. H. Mitchell is the owner in fee of the remaining three-eighths of said described premises, and denies that the said plaintiff, Dolph, and the said J. H. Mitchell, are tenants in common of the said premises.

Denies that the said plaintiff, Dolph, is entitled to the immediate possession of the whole of said premises, or any part thereof.

For a separate cause of defense, the said defendant avers that he is the owner in fee of the said premises described in the complaint, save and except the following portions thereof, to wit:

The S. W. ¼ of N. W. ¼ of section 16; the S. E. ¼ of N. W. ¼ of section 16; the fractional N. ½ of section 16; the fractional S. E. ¼ of S. W. ¼ of 16; and the N. ½ of the N. W. ¼ of section 15, containing in all 272 acres, situate in T. 7 S., R. 5 W., and being a part of the 912 acres described in said complaint; and as to the parcels last
17 described, def't avers that the title thereof is in the State of Oregon.

Defendant avers that he is in the rightful possession of all of the lands described in the said complaint, and was so possessed of the same at the commencement of this action and for a long time prior thereto.

Defendant, for a further and separate answer to pl'ff's complaint, avers that on the 21st day of February, 1874, the said premises and the whole thereof were sold by the sheriff of Polk County, Oregon, for the State, county, and school taxes, duly levied for the year 1872 against said premises, which taxes, amounting to the sum of $84.20, then remained unpaid; that the whole of said premises were duly sold by said sheriff, to satisfy said taxes so levied, to one S. W. Smith; that a certificate of sale, as by law required, was made by said sheriff and delivered to said Smith as evidence of the purchase by him of said premises at said sale, which said certificate the said Smith now holds.

18 And def't avers that no redemption has been had or made and that no part of the money has been paid or returned to said Smith so paid by him at said sale for said taxes.

BOISE, HAYDEN, MYER, DALY and SULLIVAN,
Att'ys for Def't.

STATE OF OREGON,
County of Polk, ss:

I, H. Barney, being duly sworn, do depose and say that I am the defendant in the above-entitled action, and that the *and that the* foregoing answer is true as I believe.

HARLOW BARNEY.

Subscribed and sworn to before me this 12th day of May, 1874
D. J. HOLMES, *Clerk.*

(Indorsed:) J. N. Dolph vs. Barney. Answer. Filed May 12th, 1874. D. J. Holmes, clerk.

19 In the circuit court of the State of Oregon for Polk County.

J. N. DOLPH, PLAINTIFF,
vs.
HARLOW BARNEY, DEFENDANT.

Plaintiff, for reply to the answer of the above-named defendant in the above-entitled action, denies that defendant is the owner in fee or otherwise of any portion of the premises described in the complaint in this action.

Denies that the title to the said 272 acres specifically mentioned and described by metes and bounds in said answer or to any portion thereof is in the State of Oregon, or that the State of Oregon has title to any portion of the land described in the complaint.

Denies that said defendant is in the rightful possession of all or any portion of the land described in the complaint or was rightfully in possession of said land or any portion thereof at the commencement of this action or for a long time prior thereto.

20 Denies that he has knowledge or information sufficient to form a belief as to whether on the 21st day of February, 1874, or at any other time, any portion of the said land or premises was sold by the sheriff of Polk County, Oregon, for any tax or taxes for the year 1872, or for any other year or time, and denies that any tax was duly or otherwise levied upon said premises or any portion thereof for the year 1872, or that any portion of said land was sold by the sheriff of Polk County on the 21st of February, 1874, or at any other time, for any tax duly levied on or against said premises or any portion thereof for the year 1872, or any other year or time.

Denies that plaintiff has knowledge or information sufficient to form a belief as to whether any tax amounting to the sum of $84.20, or any other sum, then or at any time remained unpaid, and therefore denies said allegation to be true.

Denies that the whole or any portion of said premises was duly sold by said sheriff to said Smith or any other person to satisfy any
21 tax so levied or in any manner levied.

Denies that any certificate of sale was by law required was made or delivered by said sheriff to said Smith or any other person as evidence of any purchase of said premises or any portion thereof at said sale or any sale or otherwise.

And denies that plaintiff has knowledge or information sufficient to form a belief as to whether said Smith now holds or ever held any certificate of sale of any portion of said premises.

And denies that any certificate of sale was ever lawfully made by said sheriff to said Smith.

And denies knowledge or information sufficient to form a belief as to whether said Smith ever paid any money at said sale, or any sale, of any portion of said premises at any sale for taxes or otherwise.

E. C. BRONAUGH,
Att'y for Pl'ff.

STATE OF OREGON,
County of Polk:

I, E. C. Bronaugh, being duly sworn, say on oath that I am the
22 att'y of the above-named plaintiff, who is not at present within this county, which is the reason I make this affidavit. That the foregoing reply is true as I verily believe.

E. C. BRONAUGH.

Subscribed and sworn to before me this 12th day of May, 1874.
D. J. HOLMES, *Clerk.*

(Indorsed:) In the circuit court of the State of Oregon, for Polk County. J. N. Dolph, pl'ff, vs. Harlow Barney & others, def'ts. Reply. Filed May 12, 1874. D. J. Holmes, clerk.

23 In circuit court of State of Oregon for county of Polk.

J. N. DOLPH, PL'FF,
vs.
HARLOW BARNEY & W. HOLMAN, DEF'TS. } Action to recover real property.

Written instructions furnished at request of def'ts' counsel.

GENTLEMEN OF THE JURY: This is an action at law brought by the pl'ff, J. N. Dolph, against the def'ts, Harlow Barney and W. Holman, to recover from them the possession of 912 acres of land, described in the complaint.

The pl'ff claims to be the owner in fee of an undivided ⅔ of the land described, and that J. H. Mitchell is the owner of the remaining ⅓ of said land as tenant in common with pl'ff.

Every conveyance or devise of lands or interest therein to two or more persons other than executors or trustees as such, creates
24 a tenancy in common in such lands unless it be expressly declared in such conveyance or devise that the grantees or devisees shall take the lands as joint tenants.

The issues in this case to be tried by you are between the pl'ff and the def't Barney, as the defendant Holman in his answer disclaims any title in or right to the lands in controversy other than a lessee or renter of the same from the defendant Barney.

But the def't Barney, in his separate answer, denies that the pl'ff is the owner in fee or otherwise of the land described in complaint, or any part thereof, or that he is entitled to the possession thereof.

Defendant Barney also denies that pl'ff is damaged by the wrongful detention of said lands from pl'ff by def'ts in the sum of $500.00, or any other sum, as claimed in complaint. But pl'ff's claim for $500.00 damages you will not consider for the reason that there was no evi-
25 dence offered by the pl'ff tending to show that he had been damaged as claimed in any sum whatever.

The def't Barney also, for a further and separate answer to pl'ff's complaint, avers that he (def't) is the owner in fee of all the lands described in complaint except 272 acres, which defendant describes in his answer and says belongs to the State of Oregon.

The def't also further avers in his answer that, on the 21st day of February, 1874, the sheriff of Polk County sold the whole of the lands described in complaint for State, county, and school taxes, to one, S. W. Smith, to whom the sheriff aforesaid then and there, in due form of law, issued a certificate of such sale, and that said land has not since been redeemed as provided by law.

The plaintiff, for reply to the new matter set up in answer, as a further and separate defence, denies each allegation thereof.

The principal question' in controversy in this case, gentlemen,
26 have arisen upon the admissibility of the evidence offered by the parties in support of their respective claims; and I do not deem it necessary now to take the time to review and explain to you the reasons upon which the various ruling' of the court in this respect, made during the progress of the trial, were based. But it will be sufficient for the purposes of this case to say to you that the evidence which was offered and admitted as competent and legal will be considered by you in making up your verdict, and that which was rejected as illegal and incompetent will not be regarded.

In this case pl'ff claims his title to the lands in dispute through a series of deeds or conveyances from John Waymire & wife, the patentees of the government under the donation-law, and from John T. Outhouse, sup't of common schools for Polk County.

Def't Barney seeks to support his claim to title to the same
27 lands, or that portion thereof claimed by him, through a deed from Ezra Scovell to him, dated Feb. 15th, 1870, and through two several deeds of date Aug. 18th, 1873, the one executed by John Waymire, and the other by his daughter Mary Ann, to the respective interests of each in the donation land-claim of John Waymire & wife, consisting of 640 acres.

But the only evidence offered by def't Barney in support of his claim to title which was admissible under the rules of evidence was the deed of Ezra Scovell to him of date Feb. 15th, 1870; and for the purpose of explaining the effect of this conveyance, pl'ff, as rebutting evidence, offered the mandate of the supreme court of this State as entered upon the journals of this court for the purpose of showing that said supreme court had held and adjudged that said last-named conveyance was null and void, because its execution had been procured through fraud.

28 It is the duty, gentlemen, of all good citizens to respect and obey the mandates of the supreme court and its adjudications

so long as they may stand unreversed; and when a conveyance has been adjudged fraudulent and void by the highest judicial authority of the State, it is in contempt of that authority for a person to disregard it and set it at defiance in any other way than by the legitimate means recognized and provided by law. It is not a legitimate method of reviewing the decisions of the supreme court of this State to attempt again to relitigate the same questions in the circuit court.

The effect, gentlemen, of record evidence, such as government patents, recorded deeds, and judgments of courts of competent jurisdiction, when properly authenticated and legally admissible, is to establish the facts which they recite, unless they are impeached or overcome by other evidence which is competent and admissible for that purpose.

29 And one tenant in common may in an action of ejectment recover the possession of the entire premises owned by him and his cotenant if the evidence show that they are entitled to the possession thereof as against the defendant in the action. It is your duty, gentlemen, to receive the law as it is given you by the court; but you are the sole judges of the credibility of witnesses and of the weight and value of the evidence given upon the trial.

No proof is required in support of an allegation in a pleading which is not contradicted by the adverse party. But in civil cases, the party who makes an affirmative allegation which is denied by the adverse party must prove such allegation by the preponderance of evidence. Whatever is admitted in open court between the parties to an action or suit need not be otherwise proven.

In this case, the def't Barney, through his attorneys, admitted

30 in open court that the lands described in the patent and the various deeds offered in evidence by the pl'ff are the identical premises in controversy in this action.

Defendant also, in the same manner, admits that John Waymire and wife, the patentees of the government under the donation-law, prior to the date of the execution of the deed offered in evidence from said Waymire & wife to Milton S. Riggs, had made their final proof in the proper land-office of their continuous residence and cultivation for four years of the lands described in the patent.

I furnish you, gentlemen, with the following written forms of verdict, one in favor of the pl'ff and the other in favor of the def't Barney, and you will fill up and sign the one, by some one of your number as foreman, which you think you are warranted in returning from the law and the evidence as given you upon the trial.

B. F. BONHAM, *Judge.*

31, 32 (Indorsed:) J. N. Dolph vs. Harlow Barney & W. Holman. Written instructions. Filed May 14, 1874. D. J. Holmes, clerk.

33 In circuit court of State of Oregon, for county of Polk.

J. N. DOLPH, PL'FF, *vs.* HARLOW BARNEY & W. HOLMAN, DEF'TS. } Action to recover real property.

We, the jury in the above-entitled cause, find that the plaintiff is the owner in fee of an undivided ($\frac{5}{8}$) five-eighths of 912 acres of land described in complaint as tenant in common with J. H. Mitchell, the owner in fee of the other undivided ($\frac{3}{8}$) three-eighths of the same, and that said pl'ff is entitled to the possession of the whole thereof.

A. W. LUCAS,
Foreman.

(Indorsed:) Filed May 14th, 1874. D. J. Holmes, clerk.

Be it remembered at a regular term of the circuit court of the State of Oregon for Polk County, began and held at the court-house in Dallas, said county, on Monday, the 11th day of May, A. D. 1874.

Present, Hon. B. F. Bonham, judge; N. B. Humphry, dis't att'y; Sam'l T. Burch, sheriff; D. J. Holmes, clerk.

When the following among other business was had and entered of record, as follows, to wit:

HARLOW BARNEY, PL'FF,
vs.
J. N. DOLPH, DEF'T.

TUESDAY, *May 12th*, 1874.

Now, at this day comes the def't, by Bronaugh, his attorney, and the said pl'ff, by Sullivan & Boise, his att'ys, and the said cause standing on the motion of the def't to strike out said cross-bill for the reason that the same is sham, frivolous, and irrelevant, and the court proceeds to hear said motion, and which is submitted to the court without argument. And the court, after fully considering the same, sustains said motion.

And it is hereupon ordered and decreed by the court that said cross-bill be stricken out.

To which ruling and decree of the court the pl'ff, by his counsel, duly excepts.

B. F. BONHAM, *Judge.*

J. N. DOLPH, PL'FF,
vs.
HARLOW BARNEY AND W. HOLMAN, DEF'TS.

MAY 14TH, 1874.

Now, at this day comes the pl'ff, by E. C. Bronaugh, his att'y, and came also the defendants, by R. P. Boise, P. C. Sullivan, and J. J. Daly, their attorneys, and both parties announcing themselves ready for trial upon the issues joined, thereupon came a jury, to wit: A. W. Lucas, G. A. Wells, Tho's Hendrick, S. T. Riggs, G. W. Berry, T. B. McTimunds, J. B. Syron, J. R. Cooper, C. B. Graves, W. H. Cooper, G. T. Waite, J. Stoffer.

And the jury having heard the pleadings and the evidence, by consent this cause is submitted to the jury without argument upon the instructions to be given them by the court, which instructions, at the request of counsel for defendants, are reduced to writing; and the jury having heard said instructions and charge of the court, retired under charge of a sworn officer to consider of their verdict, and after being absent for a short time returned into court the following verdict:

In the circuit court of the State of Oregon, for county of Polk.

J. N. DOLPH, PL'FF,
vs.
HARLOW BARNEY & W. HOLMAN, DEF'TS. } Action to recover real property.

We, the jury in the above-entitled cause, find that the pl'ff is the

owner in fee of an undivided (⅝) five-eighths of 912 acres of land, described in complaint as tenant in common with J. H. Mitchell, the
38 owner in fee of the other (⅜) three-eighths of the same, and that said pl'ff is entitled to the possession of the whole thereof.

A. W. LUCAS, *Foreman.*

It is therefore ordered and adjudged by the court that the pl'ff is the owner in fee-simple of the undivided (⅝) five-eighths of the lands described in the complaint, to wit: Commencing seven chains and seventy links east and fifteen chains and fifty links south of the northeast corner of section sixteen in township seven south of range five west of the Willamette meridian; running thence north nine chains and fifty links; thence west eighty-seven chains and fifty links; thence south forty-nine chains and fifteen links; thence east forty-seven chains; thence south thirty-nine chains and eighty-five links; thence east eighty chains; thence north eighty chains; thence west thirty-eight chains and sixty-three links to the place of beginning, containing nine hundred and twelve acres, more or less, situated in Polk County, State of Oregon.

39, 40 And that J. H. Mitchell is the owner of the remaining undivided three-eighths (⅜) of said tract of land as tenant in common with pl'ff, and that pl'ff is entitled as against said deft's, and each of them, to the immediate possession of the whole of said lands and premises described in the complaint.

And it is therefore further ordered and adjudged that pl'ff do have and recover of and from the def'ts and each of them the immediate possession of the whole of the said lands and premises described in the complaint, together with the costs and disbursements of this action, taxed at $, and do have execution therefor.

B. F. BONHAM, *Judge.*

41, 42, 43 In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PL'FF & RESPONDENT,
vs.
HARLOW BARNEY & W. HOLMAN, DEF'TS AND appellants. } Notice of appeal.

To J. N. Dolph, the above-named pl'ff, and E. C. Brunaugh, his att'y:

You are hereby notified that I appeal from the judgment rendered in the above-entitled action at the May term of the said circuit court for said county and from the whole thereof to the supreme court of the State of Oregon, which said judgment was rendered against me and in your favor for the possession of the whole of the premises described in the pl'ff's complaint filed in said action, and that the plaintiff was the owner in fee of five-eighths of said premises, and for costs and disbursements of said action.

44 You are also notified that on said appeal the def'ts will rely on the following grounds of error, to wit:

1st. The court erred in overruling def'ts' objections to the introduction of the deed from John Waymire and wife to M. S. Riggs, for a portion of the premises in question, for reasons set forth in item one of the bill of exceptions filed herein.

2nd. The court erred in rejecting the testimony offered by the def'ts to impeach the deed above referred to from John Waymire and wife to M. S. Riggs, and refusing to allow def'ts to offer testimony to impeach said deed as set forth in item two of said bill of exceptions.

3d. The court erred in overruling the objections of def'ts to the introduction of the copy of a deed from John T. Outhouse, as superintendent of common schools of Polk County, to said M. S. Riggs, for a portion of the premises in dispute in said action, as set forth more particularly in item three of said bill of exceptions.

4th. The court erred in rejecting the evidence offered by def'ts
45 to show that the said copy of a deed from said Outhouse to said M. S. Riggs was not a true copy of the record of said deed, and in rejecting the record of said deed to show its erasures and mutilations, as set forth in item four of said bill of exceptions.

5th. The court erred in overruling the objection of def'ts to the introduction of the copy of a deed from said M. S. Riggs to George Haworth for the premises in question, and in permitting said deed to be introduced as evidence in the case, for the reasons set forth in item five of said bill of exceptions.

6th. The court erred in overruling the objections of def'ts to the introduction of a copy of a deed from said Haworth to one E. Scovill; also, a copy of a deed from said Scovill to W. W. Thayer, and also a copy of a deed from said Thayer to pl'ff, and in allowing said deeds to be read in evidence, for the reasons set forth in item six of said bill of exceptions.

7th. The court erred in overruling the objections of def'ts to the
46 introduction of the copy of a judgment of the county court of the county of Marion, offered by pl'ff in support of his title to the premises in dispute, and in permitting said judgment to go to the jury as evidence, for the reasons set forth in item seven of said bill of exceptions.

8th. The court erred in overruling the objection of def'ts to the introduction (as evidence) of an execution offered by pl'ff, issued on said judgment of said Marion County court, and also the return thereon by the sheriff of Polk County (S. T. Burch), and the notice of the sale under said execution by said sheriff, and in allowing the same to be read in evidence in said action, for the reasons set forth in item eight of said bill of exceptions.

9th. The court erred in overruling the objections of the def'ts to the introduction as evidence of the confirmation of the sale of said premises under said judgment and execution, and in admitting the same as evidence in said action, for the reasons set forth in item nine of said bill of exceptions.

47 10th. The court erred in overruling the objections of def'ts to the introduction of a deed from S. T. Burch, as sheriff of Polk County, to J. H. Mitchell and J. N. Dolph, of the premises in question, and in permitting said deed to be read to the jury as evidence, for the reasons set forth in item ten of said bill of exceptions.

11th. The court erred in rejecting as evidence the deed offered by def't Barney (in support of his title to said premises) from John Waymire & wife to said def't Barney, which said deed is more particularly referred to in item twelve of said bill of exceptions.

12th. The court erred in rejecting the deed of Mary A. Waymire to the def't Barney, to a portion of the premises in question, which deed was offered by def't Barney in support of his title to the premises in question, and in refusing to allow said deed to be read as evidence in the case, and said deed and its rejection are fully set out in item thirteen of said bill of exceptions.

13th. The court erred in refusing to allow the def't to prove
48 by the introduction of the certificate of the sheriff of Polk County that the said premises in question has been sold by the

sheriff of Polk County, for State, county, and school taxes, to one S. W. Smith, and still remained in his hands unredeemed under said sale and certificate; and in sustaining the objections of pl'ff to the said proof and introduction of said certificate, all of which fully appears and is set forth in item fourteen of said bill of exceptions, to which reference is made.

14th. The court erred in rejecting as evidence the warrant on which said tax-sale was made, which said warrant was offered by def'ts as evidence to defeat the title of said pl'ff, and in sustaining the objection of pl'ff to the introduction of said warrant, for the reasons set forth in item fifteen of said bill of exceptions.

15th. The court erred in overruling the objections of def'ts to
49 the introduction of the decree of the supreme court to defeat the title of said def't Barney, and in permitting said decree to be read in evidence to the jury, for the reasons more particularly set out in item sixteen of said bill of exceptions, to which reference is made.

16th. The court erred in instructing the jury as set forth in item seventeen of said bill of exceptions, to which reference is hereby particularly made.

17th. The court erred in sustaining the motion of pl'ff to strike out the cross-bill in equity filed in this action, setting up an equitable defence,

HARLOW BARNEY, *Appellant.*
By BOISE, MYER, HAYDEN, DALY & SULLIVAN,
His Att'ys.

STATE OF OREGON,
County of Multnomah, ss:

I certify that I served the within notice of appeal within said county and State this 11th day of June, 1874, on the within-named J. N.
50 Dolph, by delivering a copy thereof, certified to by me as sheriff, to said J. N. Dolph personally in said county.

J. M. CAWOOD,
Sheriff Multnomah County,
By W'M R. GEWALL,
Deputy.

Fees, $1.45, p'd by appellant.

(Indorsed:) J. N. Dolph vs. H. Barney and W. Holman. Notice of appeal. Original. Filed June 15th, 1874. D. J. Holmes, clerk.

51 *Notice of justification.*

In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PL'FF,
vs.
HARLOW BARNEY & W. HOLMAN, DEF'TS.

To the above-named pl'ff, J. N. Dolph, or J. L. Collins, his att'y of record:

You are hereby notified that the sureties on appeal of the def'ts herein (and appellants to the supreme court of the State of Oregon) will justify and show their sufficiency as bondsmen at the office and before the county clerk of Polk County, D. J. Holmes, esq., at the hour of 11 o'clock a. m., on Thursday, June 25th, A. D. 1874.

HARLOW BARNEY & W. HOLMAN, *Def'ts,*
By BOISE, SULLIVAN, APPLEGATE,
MYER & DALY, *Their Att'ys.*

52 STATE OF OREGON,
County of Polk, ss:

I hereby certify that I served the within notice on this the 20th day of June, 1874, by delivering a true copy thereof to the within-named J. L. Collins, att'y of record, in person.

S. T. BURCH,
Sheriff of Polk County, Oregon.

(Indorsed:) Dolph vs. Barney & Holman. Notice to justify bond. Filed June 20, 1874. D. J. Holmes, clerk.

53 In the circuit court of the State of Oregon for the county of Polk.

HARLOW BARNEY, PL'FF,
vs.
J. N. DOLPH, DEF'T.

A bill in equity in the nature of a cross-bill setting up an equitable defence to an action of ejectment.

The plaintiff aforesaid comes and represents to the court that he is a defendant in an action of ejectment brought by the said defendant, J. N. Dolph, in this court, to recover the possession of certain real estate described in the complaint in said action, and that now is the time for answering said complaint in said action; and this plaintiff alleges the following facts which constitute an equitable defence to said action which he presents to the court in this complaint, which is in the nature of a cross-bill in equity to said action of ejectment.

54 And pl'ff alleges that heretofore, to wit, on the 15th day of Feb'y, 1870, one Ezra Scovill was in possession, and claimed to be the owner in fee-simple, of the whole of the premises described in the complaint in said action of ejectment.

That on that day said Scovell, for a valuable and adequate consideration, conveyed said premises to this plaintiff by a deed of that date, duly executed, acknowledged, and delivered by said Scovell to this pl'ff, which said deed was, on the day of Feb'y, 1870, duly recorded in the records of deeds for said county; that said premises were purchased by this plaintiff in good faith and for a home for himself and family.

That soon after the execution of said deed said Scovell delivered the possession of said premises to this plaintiff, and that this plaintiff has ever since continued to possess the same.

And plaintiff further shows to the court that afterwards, to wit, on or about the month of June, 1871 (the exact time pl'ff cannot state for the reason that the transaction hereinafter referred to was in writ-

55 ing, and that writing is in the possession of said Scovell, as pl'ff believes), the said plaintiff and said Scovell entered into a written contract, whereby the said plaintiff promised and agreed, and bound himself in a large sum of money, to make, execute, and deliver to said defendant a good and sufficient deed of the premises described in said def't's complaint, filed in the suit herein referred to, within one year from the date of the said writing, upon the express condition that the said Scovell would pay to the said pl'ff the sum of six thousand dollars, coin, and also deliver to this plaintiff the note of four thousand five hundred dollars, hereafter referred to, then held by the said Scovell against this plaintiff.

And plaintiff alleges that, in pursuance of said contract, the said

Scovell did then and there, upon the execution of the said written instrument by the said plaintiff, and the delivery thereof to the said
56 Scovell, deliver to this plaintiff the note of four thousand five hundred dollars, but has failed, neglected, and refused to pay to pl'ff the said sum of six thousand dollars, or any part thereof.

And plaintiff alleges that at the time the contract was entered into by and between the said parties, the said Scovell admitted and fully recognized the title in fee-simple to be in this plaintiff to all of said premises aforesaid, and then and there claimed and admitted said premises to be of the value of twelve thousand dollars.

And the said Scovell furthermore charged and alleged in his said complaint, filed against this plaintiff as aforesaid, that said premises were worth the said sum of twelve thousand dollars.

And plaintiff alleges that he has always been ready and willing to fulfill his said contract with the said Scovell, and was always ready during the time specified in said writing to execute a good and
57 sufficient deed of said premises to said Scovell upon the payment of the said six thousand dollars as aforesaid, and still is ready and willing so to do upon the payment of said last-mentioned sum, although the time has long since expired.

Plaintiff further shows that between the time when this plaintiff purchased the said premises of the said Scovell, to wit, on the 13th day of February, A. D. 1870, and the date of the aforementioned contract for the resale of the said premises to said Scovell, the said premises, as well as all real estate in the vicinity thereof, had greatly risen in value, and at the date of the said contract the said premises in question were worth double the amount they were at the date of the sale and deed to this plaintiff, or nearly so.

That afterwards, to wit, on the day of , 1871, said Scovell filed in the circuit court of said county a complaint in equity against this pl'ff, of which the paper hereto attached and marked "Ex-
58 hibit A" is a copy (excepting the oath thereto), and which is made a part of this complaint; that suit was thereon instituted against this plaintiff to declare said deed void, and compel this plaintiff to redeed said premises to said Scovell for the reasons set forth in said complaint. That issue was duly joined on said complaint by said Barney, and the allegations therein hereinafter referred to duly denied and put in issue by the said Barney.

And this plaintiff alleges that the allegations in said complaint that said Scovell (the pl'ff therein) was at the time of making said conveyance mentally infirm and not of sound mind, and so insane as to be wholly incapable of attending to business, are and were wholly false, and that the said Scovell well knew said allegations to be false when the same were so made in said complaint.

And plaintiff further alleges that the allegations in said complaint that this pl'ff was at the time of making said deed fraudulently
59 taking advantage of Scovell's incapacity, under the pretense of making a loan to said Scovell fraudulently procured Scovell to sign and execute a certain writing of that date, under seal, what purports to be a deed of said premises, and was wholly false, which said Scovell then well knew at the time of making the said allegations.

Plaintiff alleges that the allegations in said complaint that said deed was intended to be a mortgage is wholly false, which said Scovell well knew when he made said allegation; and pl'ff further alleges that the allegation in said complaint that said note named in said complaint, and the proceeds thereof, is the only consideration, directly or indirectly,

received by said Scovell for said conveyance is false, which said Scovell well knew when he made the said allegation.

And plaintiff alleges that besides said note, and as a part of the consideration of said deed, and at the time of the execution thereof,
60 he, this pl'ff, executed to said Scovell his promissory note for the sum of $4,500, which said note was then duly executed and delivered to said Scovell as a part of said consideration.

And plaintiff further alleges that said suit was prosecuted to final decision, and that a decree therein was rendered against this plaintiff in the supreme court of this State on the day of January, A. D. 1873, a copy of which decree is hereto attached and made a part of this complaint, and marked "Exhibit B."

Plaintiff further alleges that in support of the said false allegations of said complaint said Scovell offered himself as a witness, and that his testimony was taken and used in this case in the said supreme court in support thereof; that he testified in said suit that he was insane and incapable of attending to his business; that he then understood said deed to be a mortgage executed to secure the payment of said
61 sum of fifteen hundred dollars, and that the same was a loan by pl'ff to defendant, as alleged in said complaint. And he also testified in said suit that said pl'ff represented to him that said deed was a mortgage, and that, relying on such representations, he executed said deed; and that had he known that said deed was an absolute conveyance, and not a mortgage, he would not have executed the same; and that he was induced to execute said deed by the said representations of pl'ff.

And pl'ff alleges that said Scovell was the only witness who testified in said suit that said deed was understood or intended to operate as a mortgage by the parties thereto or either of them. And plaintiff alleges that said Scovell was the only witness offered on the subject of said mortgage or loan, and the only evidence offered thereon, and
62 that his evidence was the only evidence offered or received in said suit to support any allegation of fraud in said complaint.

And plaintiff alleges that he is informed and believes that had it not been for said testimony of said Scovell, so taken and used in said suit, said decree would not have been rendered against him.

And plaintiff alleges that said testimony of said Scovell, so given and used, was wholly and wilfully false, and given by him to deceive and impose on said court and defraud this plaintiff.

And plaintiff further alleges that all the allegations in said complaint above referred to were wholly false and fraudulent, and made with the intent to deceive and impose on said court and to defraud this plaintiff, and made for the purpose of fraudulently obtaining said decree.

And this plaintiff further alleges that since the testimony was
63 closed in said suit, said Scovell has repeatedly stated and acknowledged that his said allegations and his said testimony were false and made with the intent to deceive s'd court and defraud said Barney, which said statements and acknowledgements of said Scovell this plaintiff is now able to fully prove and show to the court that said decree was procured by the false and perjured testimony of said Scovell.

And plaintiff alleges that such evidence has originated and come to his knowledge since the testimony in said suit was closed and since the rendition of said decree.

And plaintiff alleges that said decree was obtained by fraud, and is in fraud of the rights of this pl'ff. And plaintiff alleges that said decree was obtained by the false and fraudulent allegations and the false testi-

mony of the said Scovell. And plaintiff alleges that said def't is
64 relying in said decree to recover in said action of ejectment, and that were it not for said decree this pl'ff has a clear title to said premises as against said defendant.

And plaintiff further alleges that pl'ff is relying on said decree to recover in said action of ejectment, and that were it not for said decree this plaintiff has a clear title to said premises as against said plaintiff in ejectment.

And plaintiff alleges, on information and belief, that said pl'ff in said ejectment denies his claim to title to said premises through said Scovell, by a sheriff's deed executed in pursuance of a sale of said premises, on execution against said Scovell since the rendition of said decree, and that said plaintiff in ejectment, at the time of the rendition of said decree, and ever since, well knew that said decree was procured by the false and perjured testimony of said Scovell, and that said decree was fraudulent, as above set forth.

65, 66 And this plaintiff alleges that he has no adequate remedy at law, and therefore he brings this suit.

Wherefore plaintiff prays that this court by its decree set aside and vacate said fraudulent decree, and that said action of ejectment be perfectly enjoined, and for such other relief as shall be just and the evidence shall warrant, and for his costs and disbursements in this suit.

SULLIVAN, DALY & BOISE,
Att'ys for Pl'ff.

STATE OF OREGON,
County of Polk, ss:

I, H. Barney, being first duly sworn, depose and say that I am the plaintiff in this suit, and that the foregoing complaint is true, as I verily believe.

HARLOW BARNEY.

Subscribed and sworn to this 12th day of May, A. D. 1874, before me.
JOHN J. DALY,
Notary Public.

67, 68, 69 EXHIBIT A.

In the circuit court of the State of Oregon for Polk County.

EZRA SCOVELL, PLAINTIFF,
vs.
HARLOW BARNEY, DEFENDANT. } *ss:*

The above-named plaintiff, complaining of the defendant above named, alleges:

I. That on the 15th day of February, A. D. 1871, he, the plaintiff, was the owner in fee simple of a tract of land situated in the county of Polk, in the State of Oregon, and bounded as follows, to wit: Commencing 7.70 chains east and 15.50 chains S. of the N. E. corner of section sixteen (16), in T. 7 S., R. 5 W. of the Willamette meridian; thence N. 9.30 chains; thence west 87.50 ch's; thence S. 49.15 ch's; thence east 47.00 ch's; thence south 39.85 ch's; thence east 80.00 ch's; thence north 80.00 chains; thence west 38.63 ch's, to the place of beginning, containing nine hundred and twelve $\frac{80}{100}$ acres of land, of the value of twelve thousand dollars.

70 II. That the plaintiff was then mentally infirm and not of sound mind, and so insane as to be wholly incapable of attending to busi-

ness; and the def't, on that day, fraudulently taking advantage of the plaintiff's incapacity, under the pretense of making a loan to the plaintiff, fraudulently procured him, plaintiff, to sign and execute a certain writing of that date, under seal, which purports to be a deed of said premises, and to convey the same in fee to the defendant, and which has been placed upon record by the defendant, but which deed was intended to be a mortgage, and at the time of its execution was represented by the defendant to this plaintiff, and agreed by him, defendant, to be taken and received by defendant merely as security for the repayment by plaintiff to defendant of the sum of one thousand five hundred dollars, the proceeds of a certain promissory note for that sum held by the defendant against one W'm Brown and Boone, and
71 which note was then alleged to be in the hands of one P. C. Sullivan for collection, and the proceeds of which it was agreed should, when collected, be paid to the plaintiff as a loan from defendant, and which sum has been collected, as pl'ff is informed, by said Sullivan on account of plaintiff, and which is the only consideration ever directly or indirectly received by plaintiff for said conveyance.

III. That on the 15th day of July, A. D. 1871, plaintiff having recovered from his mental disorders, tendered to the defendant the sum of one thousand eight hundred and fifty dollars in U. S. coin, being more than the full amount of said note and legal interest thereon, and all legal demands, expenses, and charges of defendant upon said premises, and demanded to be allowed to redeem said premises, and that defendant should redeed the same to the plaintiff; but defendant refused to accept said sum, or any sum whatever, and refused to allow
72 plaintiff to redeem said premises or redeed the same to the plaintiff; which sum plaintiff has ever been ready and willing and still is ready and willing to pay the defendant to redeem said premises. And he now brings the same into court for the defendant in redemption of said premises upon def't executing to him a sufficient deed for said premises. That the defendant intends to use said deed for his own benefit and to the prejudice of the plaintiff, and unless restrained by this honorable court will sell the same to some innocent purchaser, to the great and irreparable injury of the plaintiff.

Wherefore plaintiff prays that the defendant may be by the order of this court restrained and enjoined in selling or in any manner incumbering said premises until the final determination of this suit. That he may be allowed to redeem said premises, and that said deed from plaintiff to def't may be decreed to be void, and the defendant
73, 74 be decreed to execute to plaintiff a good and sufficient deed for said premises, and for such further relief as the facts may warrant, and for costs and disbursements.

MITCHELL & DOLPH,
Att'ys for Pl'ff.

75 EXHIBIT B.

EZRA SCOVELL, APPELLANT,
vs.
HARLOW BARNEY, RESPONDENT. } Appeal from Polk County.

This suit having been commenced in the circuit court of the State of Oregon, for the county of Polk, by the said Ezra Scovell as plaintiff, and against the said Harlow Barney as defendant, and the said suit having been tried in the said circuit court, and a decree given therein in favor of said defendant and against the said plaintiff, dismissing the

complaint with costs; and the plaintiff having appealed to this court from the said decree of the said circuit court, and the said appeal having been duly brought on for hearing upon the proofs and allegations and testimony therein, and after hearing Mess'rs Dolph and Thayer, of counsel for the said appellant, and R. P. Boise, of counsel for respondent, and due deliberation having been had therein:

76 It is adjudged and decreed that the said decree of the said circuit court so appealed from be, and the same is hereby, in all things reversed;

That the deed executed by said appellant, Ezra Scovell, to the said respondent, Harlow Barney, dated Feb'y 15, which purported to convey the following-described premises, to wit, that certain tract of land situate in the county of Polk, in the State of Oregon, and bounded as follows, to wit: Commencing 7.70 chains east, and 15.50 chains south, of the northeast corner of section 16, in township 7 south of range 5 west of the Willamete meridian; thence north 9.60 chains; thence west 87.50 chains; thence south 49.15 ch's; thence east 47.00 chains; thence south 39.85 chains; thence east 80 chains; thence north 80 ch's; thence west 38.63 chains, to the place of beginning, containing nine hundred and twelve $\frac{94}{100}$ acres of land, was procured by fraud, and is fraud*ely* and void, and that the allegations of the complaint are true.

77 And it is further ordered, adjudged, and decreed that the said deed be, and the same is hereby, set aside and held for naught and cancelled of record, and that the said respondent make, execute, and deliver to the said appellant, within ten days after the entry of this decree in the court below, a good and sufficient deed to the said above-described premises, and in default thereof it is ordered and adjudged that this decree stand for such deed.

And it appearing to this court that there was advanced to the appellant by the respondent at the date of the execution of the deed of Feb'y 15th, 1870, the sum of fifteen hundred dollars in gold coin, and, further, that on the 13th day of July, 1871, there was tendered on behalf of the said appellant to the said respondent the sum of eighteen hundred and fifty dollars in gold coin, which, sum of money was at the time of the commencement of this suit paid into the aforesaid circuit court and placed in the hands of the clerk thereof.

78 And it further appearing that at this time there is due the respondent from the appellant the sum of two hundred and twelve and $\frac{50}{100}$ dollars, interest upon the said fifteen hundred dollars advanced as aforesaid, it is therefore further ordered, adjudged, and decreed that sufficient of the said sum tendered as will pay the said sum *tendered as will pay the said sum* of seventeen hundred and twelve dollars and $\frac{50}{100}$ be paid to the respondent by the said clerk, and if from any cause there remains not in the hands of the said officer sufficient to pay the said sum of seventeen hundred twelve and $\frac{50}{100}$ dollars, it is hereby ordered that he pay as much thereof as the funds in his hands will allow, and that the appellant proceed to pay the respondent any remaining deficient.

And it is further ordered and adjudged that the said appellant recover his costs and disbursements upon this appeal, taxed at one hun-

79 dred eighty-three $\frac{50}{100}$ dollars, and his costs and disbursements in this in said circuit court, to be taxed by said court, and that a decree in accordance herewith be entered in said circuit court, and that the appellant have execution and all other appropriate remedies to enforce the same.

STATE OF OREGON,
County of Polk, ss:

I, C. G. Curl, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Salem, Oregon, this 24th day of February, 1873.

[L. S.] C. G. CURL, *Clerk*,
By E. B. STONE, *Deputy*.

80 (Indorsed:) Harlow Barney vs. J. N. Dolph. Cross-bill in equity. Filed May 12th, 1874. D. J. Holmes, clerk.

81 In the circuit court of the State of Oregon, for Polk County.

HARLOW BARNEY, PLAINTIFF,
vs.
J. N. DOLPH, DEFENDANT.

Now, on this day comes the defendant, J. N. Dolph, and moves the court to strike out and from the files of the court in this cause the so-called "bill in equity in the nature of a cross-bill, setting up an equitable defence to an action of ejectment," pending in this court between said parties to this suit, upon the ground and for the reason that said cross-bill, so called, and the matters and things therein set forth are sham, frivolous, and immaterial.

E. C. BRONAUGH,
Att'y for Defendant to said Cross-Bill.

82 (Indorsed:) In the circuit court of the State of Oregon, for Polk County. Harlow Barney, pl'ff, vs. J. N. Dolph, def't. Motion to strike out cross-bill, so called. Filed May 12th, 1874. D. J. Holmes, clerk. E. C. Bronaugh, att'y for def't.

83 *Exceptions to the rulings of the court on the trial.*

In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PL'FF,
vs.
H. BARNEY AND W. HOLMAN, DEF'T'.

Be it remembered that on the trial of this action, at the May term, 1874, the following proceedings were had:

Pl'ff offered in support of his title a deed of John Waymire and wife to M. S. Riggs, to the admission of which def't objected, for the reasons—

1st. That said deed bore a date prior to the date of the U. S. patent to a part of the premises in controversy, and also prior to the date of the certificate, which patent and certificate were to said Waymire & wife. And said patent had, just prior to the offer of the deed, been used in evidence by pl'ff, and it was then admitted by the parties, in the pres-
84 ence of the court, that said deed did bear date prior to said certificate or patent. And also that M'r's Clarissa Waymire, said

wife of John Waymire, and one of the grantees in said patent, was deceased prior to the date of said patent or certificate. And it was also admitted that final proof had been made on which said patent was issued prior to the death of said Clarissa Waymire.

But the court overruled the objections of d. f r, to which def't then duly excepted.

2nd. Def't then offered evidence to impeach said deed, tending to show that said Clarissa Waymire did not sign said deed freely and without fear or compulsion; and also to show that said John Waymire, her husband, was present when she acknowledged the same, and that she did not acknowledge the same freely and without fear or compulsion.

But the court overruled said offer and rejected said evidence, and admitted said deed in evidence. To which ruling def't then duly
85 excepted. And def't exhibits hereto attached a copy of said deed, marked "Exhibit A."

3rd. Plaintiff then offered in support of his title to a portion of said premises a certified copy from records of said county of a deed from John T. Outhouse to said Riggs for a portion of said land, which purported to be executed by said Outhouse, as the superintendent of common schools of said county; a copy of which deed is hereto attached and made a part hereof, and marked "Exhibit B." And pl'ff offered no evidence to show the authority of said superintend nt, or that he was such officer, or that the proceedings of the sale of lands described in it were regular or otherwise except the deed itself.

But the court overruled those objections of the def't; to which def't then duly excepted.

4th. Defendant then offered to show by the record of said deed then produced in court that said copy was not a true copy, and that
86 said record was interlined, and erased, and mutilated, which counsel claimed would have to be explained before the record could be admitted in evidence; but the court refused to admit such record in evidence and rejected said evidence; to which rejection of said evidence the def't then duly excepted.

5th. Plaintiff then offered in evidence to support his title a certified copy of a deed from said Riggs to George Haworth to the premises in controversy. To which last-mentioned deed def'ts objected, for the reason that no foundation was laid for the same; also for the reason such deed bears date prior to the date of the deed before mentioned from Waymire and wife to Riggs; and def't herewith exhibits said deed, and makes it a part hereof, and it is marked "Exhibit C."

The court overruled such objections to the introduction of such deed, and received the same in evidence. To which ruling of the court the def't then duly excepted.

6th. Plaintiff then offered in evidence to support his title a cer-
87 tified copy of a deed from said Haworth to said Scovell; also, a deed from Scovell to W. W. Thayer, and a deed from Thayer to plaintiff. To each of which deeds def't objected, for the reason that no title had been shown in said Haworth, Scovell, or Thayer.

But said court overruled such objections and admitted said deeds in evidence, to which ruling def't then duly excepted. Which said last-named deeds are hereto attached and marked Exhibits D, E, F, and made a part hereof.

7th. Plaintiff then offered in evidence, to support his title, a certified copy of a judgment of the county court of Marion County. To which def'ts objected for the reason—1st. That said judgment does not show

that a jury was waived. 2nd. There is no finding of the court to support said judgment. 3rd. There was no trial by a jury.

But the court overruled said objections and admitted said judgment. To which ruling def'ts then duly excepted.

88 8th. Plaintiff then offered in evidence an execution issued on said judgment, and the return thereof by the sheriff of Polk County, and the notices of sale. To which def'ts oujected for the reason that said premises described in said return and the certificate of sale should have been sold in parcels and not all in one body, and also for the reason that the said notices described 3 executions.

But the court overruled said objections and admitted said executions, and the return, and said notices. To which ruling def'ts then duly excepted.

9th. Plaintiff then offered the order of confirmation of said sale, to which def'ts objected for the reason that it appeared from the proceedings of said sale, already offered, that said sale was irregular and void, and the purchaser was the judgment-creditor.

10th. Plaintiff then offered in evidence to support his title a deed from S. T. Burch, sheriff of Polk County, to J. H. Mitchell & J. N.

89 Dolph. To which the def'ts objected for the reason that said sale was void, and for the reason that there was no evidence that said Mitchell and Dolph were lien-creditors of said Scovell, or that they had redeemed said premises from said Smith, the purchaser at sheriff's sale aforesaid, there being no evidence of their being such lien-creditors or of their having redeemed except said deed.

But the court overruled such objections and admitted said deed, to which ruling the def'ts then duly excepted, and the defendants hereto attach and make a part of their bill of exceptions said judgment, return, notice of sale, order of confirmation, and sheriff's deed, and other proceedings of said court, which are marked "Exhibit G."

The plaintiff here rested his case and offered no other evidence of his title.

11th. Defendant Barney then on his part offered, to support his title to said premises, a deed to the whole of said premises from Ezra Scovell to him, a copy of which is hereto attached and marked "Exhibit H."

90 12th. Def't then offered in evidence in support of his title a deed from John Waymire to a part of said premises, a copy of which is hereto attached and marked "Exhibit I," and made a part hereof, to which deed the plaintiff objected for the reason that said deed bears date since the deed from Waymire and wife to Riggs, heretofore named herein, and the court sustained such objections and excluded such deed; to which ruling and exclusion def'ts then duly excepted.

13th. Def't then offered in evidence a deed of Mary A. Waymire (who was admitted by the parties to be a daughter and heir of John and Clarissa Waymire aforesaid) to support his (def't's) title, a copy of which deed is hereto attached and marked "Exhibit J," and made a part hereof, to which pl'ff objected for the reason that it was subsequent in date to the deed of said John and Clarissa Waymire aforesaid, and the court sustained such objections and excluded said deed as evidence; to which ruling and exclusion def'ts then duly excepted.

91 14th. Def'ts then offered in evidence (to support the defense in the answer) that the said premises had been sold for taxes to one S. W. Smith, and were still unredeemed, the certificate of the sheriff, a copy of which is hereto attached and marked "Exhibit L," and made a part hereof. To which evidence pl'ff objected, for the reason that no

foundation was laid for the admission. And the court sustained such objection and excluded said certificate; to which ruling and rejection def'ts then duly excepted.

15th. Defendants then offered in evidence the warrant on which said sale for taxes was made, a copy of which warrant is hereto attached and marked "Exhibit M," and made a part hereof, to which the plaintiff objected, on the ground that the same did not show any authority in the sheriff to make such sale, and the court sustained such objection and rejected such warrant as evidence; to which ruling of the court and rejection the def'ts then duly excepted.

16th. Plaintiff then, as rebutting evidence, offered a decree of the supreme court of this State, to show that the deed from Ezra
92, 93 Scovell to H. Barney had been cancelled for fraud, a copy of which decree as so offered is hereto attached and marked "Exhibit K," and made a part hereof; to which the def't objected, for the reason that said decree as offered does not show that it is a decree of the said supreme court, and for the reason that said decree does not cancel said deed.

It was admitted in the trial that the lands in controversy are the same lands described in the patent deed offered in evidence by pl'ff.

But the court overruled such objections and admitted said decree in evidence, to which ruling the def'ts then duly excepted.

This bill of exceptions is presented to the court for allowance.

SULLIVAN AND BOISE,
Att'ys for Barney.

Allowed May 15th, 1874.

B. F. BONHAM, *Judge.*

94, 95 17th. *Exceptions to within charge of the court.*

In the circuit court of the State of Oregon for the county of Polk.

J. N. DOLPH, PL'FF,
vs.
H. BARNEY & W. HOLMAN, DEF'TS.

Def't H. Barney excepts to the charge of the court in this case to that part thereof which states: "But the only evidence offered by def't Barney in support of his claim to title, which was admissible under the rules of evidence, was the deed of Ezra Scovell to him of date Feb. 15th, 1870."

Also all that is contained in said charge relative to the decree of the supreme court named in said charge, or of the authority of said decree.

Also all that is said in said decree to the effect that one tenant in common may in one action of ejectment recover the possession of the entire premises owned by him and his co-tenant, if the evidence shows that they are entitled to the possession thereof, or against the defendant in the action, which exceptions are presented for allowance.

SULLIVAN & BOISE,
Att'ys for Barney.

96 Be it further remembered that the foregoing exceptions to the instructions of the court were made in the following manner, to wit:

After the jury had retired to consider of their verdict, counsel for de-

fendants asked for the written instructions of the court, suggesting at the time that they desired to except portions of the same, which portions excepted to were this day specified as aforesaid, and the attention of the court called thereto.

The foregoing bill of exceptions is allowed this 15th day of May, 1874.

B. F. BONHAM, *Judge.*

97 Ex. K.

EZRA SCOVELL, APPELLANT, *vs.* HARLOW BARNEY, RESPONDENT. } Appeal from Polk County.

This suit having been commenced in the circuit court of the State of Oregon, for the county , by the said Ezra Scovell, as plaintiff, and against the said Harlow Barney, as defendant, and the said suit having been tried in the said circuit court, and a decree given therein in favor of said defendant and against the said plaintiff, dismissing the complaint with costs; and the plaintiff having appealed to this court from the said decree of the said circuit court, and the said appeal having been duly brought on for hearing upon the proofs and allegations and testimony therein; and after hearing Mess'rs Dolph and Thayer, of counsel for the said appellant, and R. P. Boise, of counsel for respondent, and due deliberation having been had therein:

It is adjudged and decreed that the said decree of the said circuit court so appealed from be, and the same is hereby, in all things reversed.

That the deed executed by said appellant, Ezra Scovell, to the
98 said respondent, Harlow Barney, dated Feb. 15th, which purported to convey the following-described premises, to wit: That certain tract of land situate in the county of Polk, in the State of Oregon, and bounded as follows, to wit: Commencing $7\frac{70}{100}$ chains east and $15\frac{50}{100}$ chains south of the northeast corner of section 16, in township 7 south, range 5, west of the Willamette meridian; thence north $9\frac{60}{100}$ chains; thence west $87\frac{50}{100}$ chains; thence south $49\frac{15}{100}$ chains; thence east 47 chains; thence south $39\frac{85}{100}$ chains; thence east 80 chains; thence north 80 chains; thence west $38\frac{63}{100}$ chains, to the place of beginning, containing nine hundred and twelve and $\frac{50}{100}$ acres of land, was procured by fraud, and is fraudulent and void; and that the allegations of the complaint are true.

And it is further ordered, adjudged, and decreed that the said deed be, and the same is hereby, set aside and held for naught, and cancelled of record, and that the said respondent make, execute, and deliver to the said appellant, within ten days after the entry of this decree in the court below, a good and sufficient deed to the said above described premises; and, in default thereof, it is ordered and adjudged that
99 this decree stand for such deed.

And it appearing to this court that there was advanced to the appellant by the respondent, at the date of the execution of the deed of Feb. 15th, 1870, the sum of fifteen hundred dollars, in gold coin; and, further, that on the 13th day of July, 1871, there was tendered, on behalf of the said appellant to the said respondent, the sum of eighteen hundred and fifty dollars, in gold coin, which sum of money was at the time of the commencement of this suit paid into the aforesaid circuit court, and placed in the hands of the clerk thereof; and it further appearing that at this time there is due the respondent, from the appellant, the sum of two hundred and twelve and $\frac{50}{100}$ dollars, interest upon

the said fifteen hundred dollars advanced as aforesaid, it is therefore further ordered, adjudged, and decreed that sufficient of the said sum tendered as will pay *the said sum tendered as will pay* the said sum of seventeen hundred and twelve and $\frac{50}{100}$ dollars be paid to the respondent by the said clerk; and if from any cause there remains not in the hands of said officer sufficient to pay the said sum of seventeen hundred
100 and twelve & $\frac{50}{100}$ dollars, it is hereby ordered that he pay as much thereof as the funds in his hands will allow, and that the appellant proceed to pay the respondent any remaining deficit.

And it is further ordered and adjudged that the said appellant recover his costs and disbursements in this in said circuit court, to be taxed by said court, and that a decree in accordance therewith be entered in said circuit court, and that the appellant have execution and all other appropriate remedies to enforce the same.

STATE OF OREGON,
County of Marion, ss:

I, C. G. Curl, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 24th day of February, A. D. 1873.

C. G. CURL, *Clerk*,
By E. B. STONE, *Deputy*.

101, 102 To the circuit court of the State of Oregon for the county of Polk.

You are hereby commanded that of the above judgment order of our supreme court upon the record of your court you cause proper entry to be made as of a judgment therein, and proceed to final determination and execution as to the said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, this 24th day of Feb'y, A. D. 1873.

[L. S.]

C. G. CURL,
Clerk,
By E. B. STONE,
Deputy.

Rec'd and entered of record this 26th day of Feb'y, 1873.

D. J. HOLMES,
Clerk.

103 EXHIBIT L.

STATE OF OREGON,
County of Polk, ss:

I, S. T. Burch, sheriff of Polk County, do hereby certify that by virtue of the warrant appended to the delinquent-tax roll of the county of Polk, and State of Oregon, for the year 1872, to me directed, and commanding me that of the effects of the delinquent tax-payers thereon named to collect the taxes due said county and State for the said year,

1872, on Saturday the 21st day of February, 1874, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, in front of the court-house door, in Dallas, in said county and State, and after giving due notice of said sale, as by law required, did sell to me, S. W. Smith, for the sum of $84.20, at public auction, the following-described premises: Beginning at a post 7.70 chains east and 15.15 chains south of the N. E. quarter of section 16, in t'p 7 S., R. 5 W. of the Willamette meridian; thence north 9.5 chains; thence west 87.50 chains; thence S. 49.15; thence east 47 chains; thence S. 39.85; thence east 80 ch's; thence N. 80 ch's; thence W. 38.63, to the place of beginning, containing 912.94 acres of land, the said sum of $84.20 being the highest bid offered for said premises.

104 And I further certify that at said time and place and under said authority, and after due notice as aforesaid, I sold to the said S. W. Smith for the sum of $40, the following-described land: the west half of the donation land, estate of John H. Nicklin & wife, the same having been purchased by said Barney from E. A. Graham & wife, as appears upon the records of Polk County. The said sum of $40 being the highest for said premises; said premises being sold subject to redemption.

Dated this Feb'y 24th, 1874.

S. T. BURCH,
Sheriff of Polk County, Oregon.

Recorded March 28th, 1874.

D. J. HOLMES,
Clerk,
By R. L. FRAKER,
Deputy.

105 EXHIBIT J.

This indenture witnesseth that I, Mary Ann Waymire, for the consideration of the sum of fifty dollars, to me paid, have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim unto Harlow Barney the following-described premises, to wit, all my right, title, and interest in the north half of the donation land-claim of John Waymire and his wife, Clarissa Waymire, certificate No. 4129, not. No. 1935, being situated in Polk County, Oregon, and in sections 15, 16, 21, & 22, and said north half containing 320 acres of land, it being my intention to hereby convey my interest in said land, which has descended to me as one of the heirs at law of my mother, the said Clarissa Waymire, now deceased. To have and to hold the said premises with their appurtenances unto the said Harlow Barney, his heirs and assigns, forever.

In witness whereof I have hereunto set my hand and seal this 18th day of August, A. D. 1873.

MARY ANN WAYMIRE. [SEAL.]

In presence of—
R. P. BOISE.
R. L. FRAKER.

106 STATE OF OREGON,
County of Polk, ss:

On the 18th day of August, A. D. 1873, before the undersigned, a county clerk, came the above-named Mary Ann Waymire, who is known

to me to be the identical person described in and who executed the within instrument, and acknowledged that she executed the same.

Witness my hand and seal this 18th day of August, A. D. 1873.

[L. S.] D. J. HOLMES, *Clerk*,
By R. L. FRAKER, *Deputy*.

Recorded August 18th, 1873.

D. J. HOLMES, *Clerk*.

107 Ex. I.

This indenture witnesseth that I, John Waymire, for the consideration of the sum of one hundred dollars, to me paid, have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim unto Harlow Barney the following-described premises, to wit: All my donation land-claim under act of Congress of the 27th of Sept., 1850, known as the donation land-certificate No. 4129, notification No. 1935, the same being situate in Polk County, State of Oregon, and being parts of sections 15, 16, 21, and 22 in t'p 7 S., R. 5 west, and containing 640 acres, it being my intention by this conveyance to convey all my title in said land acquired by reason of said act of Congress. To have and to hold the said premises with their appurtenances unto the said Harlow Barney, his heirs and assigns, forever.

In witness whereof I have hereunto set my hand and seal this 18th day of August, A. D. 1873.

JOHN WAYMIRE. [SEAL.]

In presence of—
R. P. BOISE.
R. L. FRAKER.

108 STATE OF OREGON,
County of Polk, ss:

On this 18th day of August, A. D. 1873, before the undersigned, a county clerk, came the above-named John Waymire, who is known to me to be the identical person described in and who executed the within instrument, and acknowledged that he executed the same.

Witness my hand and seal this 18th day of August, A. D. 1873.

[L. S.] D. J. HOLMES, *Clerk*,
By R. L. FRAKER, *Deputy*.

Recorded August 18th, 1873.

D. J. HOLMES,
Recorder.

109 Ex. H.

This indenture witnesseth that Ezra Scovell, for the consideration of the sum of six thousand dollars, to him paid, has bargained and sold, and by these presents do bargain, sell, and convey unto Harlow Barney the following-described premises, to wit: Beginning 7.70 ch's east and 15.50 chains south of the northeast corner of sec. 16, in T. 9 S., R. 5 west of the Willamette meridian; running thence north 9.00 ch's; thence west 87.50 ch's; thence south 49.15 ch's; thence east 47.00 ch's; thence south 39.85 ch's; thence east 80.00 ch's; thence north 80.00 ch's; thence west 38.63 ch's, to the place of beginning, containing $912\frac{96}{100}$ acres, more or less, situate, lying, and being in Polk County, Oregon. To have and

to hold the said premises with their appurtenances unto the said Harlow Barney, his heirs and assigns, forever.

And the said Ezra Scovell does hereby covenant to and with the said Harlow Barney, his heirs and assigns, that he is the owner in fee-simple of said premises, that they are free from all incumbrances, and that he will warrant and defend the same from all lawful claims whatsoever.

In witness whereof we have hereunto set our hand and seal this
110 15th day of Feb'y, A. D. 1870.

EZRA SCOVELL. [SEAL.]

Done in presence of—
W. C. WHITSON.
J. I. THOMPSON.

[U. S. rev. st'ps $6.00.]

STATE OF OREGON,
County of Polk, ss:

On this the 15th day of Feb'y, A. D. 1870, personally came before me, a county clerk in and for said county, the within-named Ezra Scovell, to me personally known to be the identical person described in and who executed the within instrument, and acknowledged to me that he executed the same freely for the uses and purposes therein named.

Witness my hand and seal this 15th day of Feb'y, A. D. 1870.

[L. S.] J. I. THOMPSON,
Clerk.

Recorded Feb'y 3, 1870.

J. I. THOMPSON,
Recorder.

111 Ex. F.

Know all men by these presents that W. W. Thayer and Semantha C. Thayer, his wife, in consideration of the sum of one dollar and other valuable considerations received of J. N. Dolph, do hereby bargain, sell, and convey unto said J. N. Dolph the following-described parcel of real estate, to wit: The undivided fourth part of the tract of land described and bounded as follows: Commencing 7.70 chains east and 15.50 ch's south of the N. E. corner of section 16 in t'p 7 south, of range 5 west of the Willamette meridian; thence north 9.50 ch's; thence west 87.50 ch's; thence south 49.15 ch's; thence east 47 ch's; thence south 39.85 ch's; thence east 80 ch's; thence north 80 ch's; thence west 38.63 ch's, to the place of beginning, containing in all 912.94 acres of land, which said parcel of land is situated in Polk County, State of Oregon, and is the same conveyed by Ezra Scovell to W. W. Thayer by deed bearing date December 21st, A. D. 1872. To have and to hold unto the said J. N. Dolph, his heirs and assigns, forever.

In witness whereof they have hereunto set their hands and
112 seals this 28th day of April, A. D. 1874.

W. W. THAYER. [SEAL.]
SEMANTHA C. THAYER. [SEAL.]

Executed in presence of—
RUTH HOSMER.
J. A. NEWELL.

STATE OF OREGON,
County of Multnomah, ss:

This certifies that on this 28th day of April, A. D. 1874, before me, the undersigned, personally appeared the within-named W. W. Thayer

and Semantha C. Thayer, his wife, known to me to be the persons described in and who executed the within instrument, and the said W. W. Thayer acknowledged the same to be his free act and deed.

And the said Semantha C. Thayer, on examination separate and apart from her husband, acknowledged that she executed the same freely and without fear or compulsion from any one.

Witness my hand and notarial seal.

S. W. RICE,
Notary Public for Oregon.

Recorded May 1st, A. D. 1874.

D. J. HOLMES,
Clerk,
By R. L. FRAKER,
Deputy.

113 Ex. E.

Know all men by these presents that I, Ezra Scovell, in consideration of one dollar to me in hand paid by W. W. Thayer, of Portland, Oregon, and of certain services done and performed by Mitchell & Dolph, as attorneys and counselors at law, as per contract between me and them, which said contract is in writing and bears date July 13th, 1871, and of services performed by said Thayer as attorney at law for me, by the employment of said Mitchell & Dolph, and in consideration, further, that said Mitchell & Dolph have requested this deed to be executed to said W. W. Thayer in satisfaction of said contract, do hereby, in accordance with said contract and in pursuance of said request, grant, bargain, sell, and convey unto the said W. W. Thayer the following-described premises in real estate, situate in the county of Polk and State of Oregon, viz: The one undivided fourth (¼) part of the tract of land described and bounded as follows: Commencing 7.70 ch's east and 15.50 chains south of the N. E. corner of section 16, t'p 7 S., R. 5 west of the Willamette meridian; thence north 9.50 ch's; thence west
114 87.50 ch's; thence south 49.15 ch's; thence east 47 chains; thence south 39.85 ch's; thence east 80 chains; thence north 80 ch's; thence west 38.63 ch's, to the place of beginning, containing in all 912.96 acres of land; to have and to hold unto the said W. W. Thayer, his heirs and assigns, for ever.

It is further understood that said Mitchell & Dolph now have a mortgage upon the said premises, given to secure the payment of the sum of $1,850, gold coin, and interest thereon, money advanced by them for me, and which mortgage bears date July 13th, 1871, and which said money and interest I hereby covenant to pay, and to discharge the said premises from and of all claims and incumbrances; and I hereby further covenant to and with the said W. W. Thayer and his heirs and assigns that I have good right to convey, that the said land is free and clear of all incumbrances, and that I will forever warrant and defend the title thereto against any and all persons lawfully claiming or to claim the same, or any part thereof.

In witness whereof I have hereunto set my hand and seal this 21st day of December, A. D. 1872.

115, 116 EZRA SCOVELL. [SEAL.]

Signed, sealed, and delivered in presence of—

B. KILLIN.
JOSEPH SIMON.

STATE OF OREGON,
County of Multnomah, ss:

This certifies that on this 21st day of December, A. D. 1872, before me, the undersigned, a notary public in and for said county and State, personally appeared Ezra Scovell, to me known personally to be the identical person described in and who executed the foregoing deed, and acknowledged to me that he executed the same freely and voluntarily for the purposes and uses therein set forth.

In witness whereof I have hereunto set my hand and affixed my seal the date last above written.

[L. S.] JOSEPH SIMON,
Notary Public in and for the State of Oregon.

Recorded December 23d, 1872.

D. J. HOLMES, *Clerk.*

117 Ex. D.

This indenture witnesseth that George Haworth and Mary Haworth, his wife, for the consideration of the sum of seven thousand dollars to us paid, have bargained and sold, and by these presents do bargain, sell, and convey, unto Ezra Scovell the following-described premises, to wit: Beginning 7.70 chains east and 15.50 ch's south of the northeast corner of section 16, in t'p 7 S, R. 5 west of the Willamette meridian; running thence north 9.00 ch's; thence west 87.50 ch's; thence south 49.15 ch's; thence east 47.00 ch's; thence south 39.85 ch's; thence east 80.00 ch's; thence north 80 ch's; thence west 38.63 ch's, to the place of beginning, containing 912.94 acres, more or less, situate, lying, and being in Polk County, Oregon: To have and to hold the said premises, with their appurtenances, unto the said Ezra Scovell, his heirs and assigns forever.

And I, the said George Haworth, do hereby covenant to and with the said Ezra Scovell, his heirs and assigns, that I am the owner in fee-simple of said premises; that they are free from all incumbrances,
118 and that I will warrant and defend the same from all lawful claims whatsover.

In witness whereof we have hereunto set our hand and seal this 26th day of July.

GEORGE HAWORTH. [SEAL.]
her
MARY + HAWORTH. [SEAL.]
mark.

Done in presence of—
J. M. PHY.
W. C. WHITSON.

STATE OF OREGON,
County of Polk, ss:

On this the 26th day of July, A. D. 1867, personally came before me, a county judge in and for said county, the within-named George Haworth and Mary Haworth, his wife, to me personally known to be the identical persons described in and who executed the within instrument, and acknowledged to me that *he* executed the same freely for the uses and purposes therein named.

And the said Mary Haworth, on examination separate and apart from

her said husband, acknowledged to me that she executed the same freely and without fear or compulsion from any one.

Witness my hand this 26th day of July, A. D. 1867.

W. C. WHITSON,
Co. Judge.

Recorded October 19th, 1867.

J. I. THOMPSON,
Recorder.

119 Ex. C.

This indenture witnesseth that we, Milton S. Riggs and Eliza J. Riggs, his wife, for the consideration of eight thousand dollars, to us paid, have bargained and sold, and by these presents do bargain, sell, and convey unto George Haworth the following-described premises, to wit: Beginning 7.70 chains east & 15.50 ch's south of the N. E. corner of section 16, in township 7 S., R. 5 W. of the Willamette meridian; running thence north 9.00 ch's; thence west 87.50 ch's; thence south 49.15 ; thence east 47.00 ch's; thence south 39.85 ch's; thence east 80.00 ch's; thence north 80.00 ch's; thence west 38.63 ch's. to the place of beginning, containing nine hundred and twelve & $\frac{94}{100}$ acres, more or less, situate, lying, and being in Polk County, State of Oregon: To have and to hold the said premises, with their appurtenances, unto the said George Haworth, his heirs and assigns forever.

And I, the said M. S. Riggs, do hereby covenant to and with the said George Haworth, his heirs and assigns, that I am the owner in fee-simple of said premises; that they are free from all incumbrances, and that I will warrant and defend the same from all lawful claims whatsoever.

120 In witness whereof we have hereunto set our hands and seals this 21 day of February, A. D. 1866.

M. S. RIGGS. [SEAL.]
ELIZA J. RIGGS. [SEAL.]

Done in presence of—
JA'S B. RIGGS.
W. C. WHITSON.

[U. S. rev. st'ps, $8.00.]

STATE OF OREGON,
County of Polk, ss:

On the 21st day of Febr'y, A. D. 1866, personally came before me, a county clerk in and for said county, the within-named M. S. Riggs and Eliza J. Riggs, his wife, to me personally known to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely for the uses and purposes therein named.

And the said Eliza J. Riggs, on examination separate and apart from her said husband, acknowledged to me that she executed the same freely and without fear or compulsion from any one.

[SEAL.] W. C. WHITSON, *Clerk.*

Recorded February 21st, 1866.

W. C. WHITSON,
Recorder.

121 Ex. B.

Know all men by the presents that, in pursuance of an act of the legislative assembly of Oregon Territory, entitled "An act to amend *and entitled* an act to provide for the sale of common-school lands of the Territory of Oregon," passed the house of representatives, January 27th, 1858, and passed the council January 30th, 1858, I, John T. Outhouse, superintendent of common schools for the county of Polk, in the State of Oregon, for and in consideration of the sum of five hundred and forty-five dollars 88/100 in hand paid by Milton S. Riggs, as purchase-money for the tract of land hereinafter described by him, purchased at the public sale of common-school lands, held at Dallas, on Monday, the 14th day of February, 1859, in pursuance of law relating to the sale thereof, have bargained and sold, and by these presents do bargain, sell, and convey unto the said Milton S. Riggs, his heirs and assigns forever, the following real estate, to wit: All those tracts of land situated and being in Polk County, in the State of Oregon, and known in the surveys of the United States as the S. W. ¼ of N. W. ¼ section
122 16, S. E. ¼ of N. W. ¼ of section 16, fractional north half of section 16, fractional S. E. ¼ and S. W. ¼ of section 16; also fractional N. ½ of N. W. ¼ of sec. 15, containing in all 272.96 acres, more or less, and more particularly describedas follows: Bounded on the north by the claim of George ; east, by Nelson Johnson; south and east, Brown and Asa C. Parker, by John Waymire and John F. Kimsey; and west, Stephen D. Taylor and Asa C. Parker, and containing all the school-land in sections 16 & 15, in t'p 7 S., R. 5 west of the Willamette meridian, together with all the privileges and appurtenances thereunto belonging: To have and to hold the said premises, with their appurtenances, unto the said Milton S. Riggs, his heirs and assigns forever.

Dallas, January 17th, 1861.

[SEAL.] JOHN T. OUTHOUSE,
Sup't of Common Schools, Polk County, Oregon.

Attest:
J. S. HOLMAN.
DAVID CASPER.

STATE OF OREGON,
County of Polk, ss:

123, 124 On this 17th day of January, 1861, personally appeared before me, county judge of Polk County, J. T. Outhouse, superintendent of common schools for said county, who is personally known to me as the party described in the foregoing conveyance, and acknowledged that he executed the same for the purposes therein contained.

B. HAYDEN,
County Judge of Polk County, Oregon.

Recorded Jan'y 19th, 1861.

B. F. NICHOLS,
Clerk C. C.,
By WM. GRANT,
Deputy.

125 Ex. A.

This indenture witnesseth that John Waymire and Clarissa Waymire, his wife, for the consideration of one dollar to us paid, the receipt

whereof is hereby acknowledged, have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim, unto M. S. Riggs the following-described premises, to wit: The donation-land claim of *of* said John Waymire and Clarissa Waymire, his wife, notification No. 1935 and claim No. 47, t'p 7 S., R. 5 west, Willamette meridian, and more particularly described as : beginning 7.00 chains east of the center of section 16 in said t'p; running thence south 55.56 chains; thence east 80.00 ch's; thence north 80.00 chains; thence west 80.00 ch's; thence south 24.44 chains to the place of beginning, containing 640 acres, more or less, situate, lying, and being in Polk County, Oregon: To have and to hold the above named and described premises, together with the hereditaments and appurtenances thereunto belonging or in any wise appertaining, unto the said M. S. Riggs, his heirs and assigns, forever.

126 In witness whereof we have hereunto set our hands and seals this 9th day of December, A. D. 1867.

JOHN WAYMIRE. [SEAL.]

her
CLARISSA + WAYMIRE. [SEAL.]
mark.

Witnesses:
W. C. WHITSON.
CHARLES LAFOLLETT.
[U. S. rev. st'ps, 50 c'ts.]

STATE OF OREGON,
County of Polk, ss:

On this 9th day of December, A. D. 1867, personally appeared before the undersigned John Waymire and Clarissa, his wife, who are known to me to be the identical persons described in and who executed the foregoing conveyance, and acknowledged that they executed the same for the purposes therein set forth.

And the said Clarissa, wife of the said John Waymire, in an examination separate and apart from her said husband, acknowledged that she executed the same freely and voluntarily, and without fear or compulsion from any one.

W. C. WHITSON,
Co. Judge.

Recorded December 27th, 1867.

J. I. THOMPSON,
Recorder.

127 EX. G.

In the county court of the State of Oregon for the county of Marion.

J. J. SHAW & R. MALLORY, PLAINTIFFS,
vs.
EZRA SCOVELL, DEFENDANT.

The plaintiffs in the above-entitled action, complaining of the defendant therein, allege that the dates hereinafter mentioned pl'ffs were and still are partners, doing business as such partners as attorneys and counsellors at law in the city of Salem, in the county of Marion, in the State of Oregon, under the firm-name of Mallory and Shaw.

That between the first day of November, A. D. 1872, and the 1st

day of April, A. D. 1873, the said plaintiffs, at the special instance and request of said defendant, at said city of Salem, rendered professional services to said defendant as attorneys and counsellors at law, in counselling said defendant concerning matters which the said defendant had in litigation in the circuit court of the State of Oregon for the county of Polk, and concerning his, def't's, rights, and concerning sundry matters of law in which he, said def't, requested counsel and
128 advice, and in drawing the papers for the commencement of an action which said defendant was about to bring in the courts in Yam Hill County.

That said services were reasonably worth the sum of fifty dollars; that no part thereof has been paid, and there is still due plaintiff from defendant therefor the sum of fifty dollars.

Wherefore plaintiffs demand judgment against said def't for the said sum of fifty dollars, together with costs and disbursements and interest.

MALLORY AND SHAW,
Attorneys for S.

STATE OF OREGON,
County of Marion, ss:

I, J. J. Shaw, being duly sworn, say I am one of the plaintiffs in the foregoing complaint, and said complaint is true, as I verily believe.

J. J. SHAW. [SEAL.]

Subscribed and sworn before me this 14th day of June, A. D. 1873.

D. H. MURPHY, *Clerk*,
By O. J. CARR, *Deputy.*

129 In the county court of the State of Oregon for the county of Marion.

J. J. SHAW AND MALLORY, PLAINTIFFS,
vs.
EZRA SCOVELL, DEFENDANT.

The above-named defendant, for answer to the complaint of the above-named plaintiffs, filed herein, denies that between the first day of November, 1872, and the first day of April, 1873, or at any other time, the pl'ffs, at the special instance or request of this defendant, or otherwise, at Salem or other place, rendered professional services to de't as attorneys or counsellors at law or in any other capacity in counselling defendant concerning matters which defendant had in litigation in the circuit court of the State of Oregon for the county of Polk, or concerning defendant's rights, or concerning sundry or any matters of law in which defendant requested counsel or advice, or in drawing papers for the commencement of an action which defendant was about to bring in
130 the court in said Polk County; denies that any services done by plaintiffs for him were worth fifty dollars or any sum except as hereinafter mentioned.

Said defendant, further answering said complaint, says that he did engage pl'ffs to draw a complaint in a matter had in Yam Hill County, and upon one or two occasions had casual talk with pl'ffs concerning matters which he had in litigation, but that he never retained nor employed plaintiffs in his matters of litigation in any court in Polk County; that all the services done by plaintiffs for him were not worth to exceed the

sum of ten dollars, which sum he is willing plaintiffs shall take judgment against him herein.

THAYER & WILLIAMS,
Def't's Att'ys.

STATE OF OREGON,
Marion County, ss:

I, Ezra Scovell, defendant herein, after being duly sworn, say that the foregoing answer is true, as I verily believe.

EZRA SCOVELL.

Subscribed and sworn to before me this 21st day of June, A. D. 1873.
[SEAL.] D. H. MURPHY, *Clerk.*

131 In the county court of the State of Oregon for the county of Marion.

J. J. SHAW & R. MALLORY, PL'FF',
vs.
EZRA SCOVELL, DEF'T.

The above-named pl'ff, replying to that part of def't's answer which alleges new matter in defence, denies that def't had any casual talk with pl'ffs concerning matters which def't had in litigation; deny that def't did not talk with pl'ffs on more than one or two occasions; and deny that def't never retained or employed pl'ffs in his, def't's matters of litigation in any court in Polk County; and deny that all the services done by pl'ffs for def't were not worth to exceed the sum of ten dollars. And pl'ffs allege that the services as stated in pl'ffs' complaint were rendered def't by pl'ffs at def't's instance and request, and were reasonably worth the sum of fifty dollars, as stated in said complaint.

132 Wherefore pl'ffs ask judgment as demanded in said complaint.

G. W. LAWSON.
Att'ys for Pl'ffs.

STATE OF OREGON,
County of Marion, ss:

I, J. J. Shaw, being duly sworn, say I am one of the pl'ffs named in the foregoing reply; that said reply is true, as I verily believe.

J. J. SHAW.

Subscribed and sworn before me this 7th day of July, A. D. 1873.
D. H. MURPHY, *Clerk.*

133 At a term of the county court of the State of Oregon for the county of Marion, held at the court-house in Salem in said county on the 7th day of July, A. D. 1873, and from day to day thereafter during the continuance of said term—

Present, the Hon. C. N. Perry, judge; D. H. Murphy, clerk; L. S. Scott, sheriff—

Among other the following proceedings were had, to wit:

MALLORY & SHAW, PL'FFS,
vs.
EZRA SCOVELL, DEF'T.

On this day this cause came on to be heard, the said pl'ffs appearing

by G. W. Lawson, esq., their att'ys, and the said def't appearing by Mess'rs Simpson and Stone, his att'ys.

And the court having been fully advised in the premises, and having fully heard and considered the allegations and proofs of the parties and the argument of counsel, it is ordered and adjudged by the court that the pl'ffs have and recover of the def'ts herein the sum of fifty dollars, together with the costs and disbursements of this action, taxed
134 at the sum of nineteen $\frac{55}{100}$ dollars, and that execution issue therefor.

C. N. TERRY,
County Judge.

135 STATE OF OREGON,
County of Marion, ss:

To the sheriff of the county of Polk, greeting:

Whereas on the 7th day of July, 1873, by consideration of the county court of the county of Marion, in the State of Oregon, Mallory and Shaw, plaintiffs, recovered judgment against Ezra Scovell, defendant, for the sum of fifty dollars damages and costs, which judgment was enrolled and docketed in the clerk's office of said court on the 7th day of July, 1873, and duly assigned to S. W. Smith on the 5th day of August, 1873:

Therefore, in the name of the State of Oregon, you are commanded that out of the personal property of the said def't, or, if sufficient cannot be found, then out of the real estate belonging to the said def't in your county, on or after the said 7th day of July, 1873, you satisfy the sum of fifty dollars now due on said judgment, with interest at the rate of ten per cent. per annum from the 7th day of July, 1873, and the further sum of nineteen dollars and 55 cents costs, and also the costs of an upon this writ, and have the same in the said court in sixty days after you receive this writ.

Witness my hand and the seal of said court this 5th day of August, A. D. 1873.

[SEAL.]

D. H. MURPHY, *Co. Clerk,*
By A. J. CARR, *Deputy.*

136 *Return.*

STATE OF OREGON,
County of Polk:

I, S. T. Burch, sheriff of Polk County, hereby return the attached execution satisfied in full in the following manner, to wit: Not being able to find personal property sufficient to satisfy said judgment, I levied upon and sold in front of the court-house door, in Dallas, of said county, after advertising the same as by law required, the following-described real estate belonging to the judgment-debtor, to wit, all of the right, title, and interest of Ezra Scovell in and to the real estate described as commencing seven chains and seventy links east and fifteen chains and fifty links south of the N. E. corner of section 16, in T. 7 S., R. 5 W. of the Willamette meridian, and running thence N. 9 ch's; thence W. 87 ch's 50 links; thence S. 49 ch's 15 links; thence east 47 ; thence S. 39 & 85 links; thence E. 80 ch's; thence N. 80 ch's; thence W. 38 ch's 63 links, to the place of beginning, containing 912 , more or less, situate in the county of Polk and State of Oregon.

Notice of said sale was given by four consecutive publications of the same in the Liberal Republican, a weekly paper and the litigant
137, 138 organ in and for said county of Polk, and also by posting notices

for four consecutive weeks in the following places, to wit: One in conspicuous place in the court-house at Dallas; one on the Brunk bridge crossing the Rickreal on the road leading from Salem to Independence; also one on the front of A. Wolf's store in Independence. Said sale was made in front of the court-house door by public outcry on Saturday, the 13th day of September, 1873, between the hours of 9 a. m. and 4 o'clock p. m. of said day, and struck to S. W. Smith for the sum of $116.00, being the highest bid offered. Dated this 27th day of September, 1873.

S. T. BURCH,
Sheriff Polk County.

139 *Sheriff's sale.*

By virtue of three several executions hereinafter described and to me directed, I have levied upon and will sell to the highest bidder for cash in hand, at public auction at the court-house door in the town of Dallas, county of Polk and State of Oregon, between the hours of 9 o'clock a. m. and 4 o'clock p. m., on Saturday, the 13th day of September, 1873, the following-described real property, to wit: all of the right, title, and interest of Ezra Scovell in and to the estate described as commencing 7 ch's and 70 links E. and 15 ch's and 50 links S. of the N. E. corner of section 16 in T. 7 S., R. 5 W. of the Willamette meridian; running thence N. 9 ch's; thence W. 87 ch's & 50 links; thence S. 49 ch's and 15 links; thence E. 47 ch's; thence S. 39 ch's and 85 links; thence, E 80 ch's; thence N. 80 ch's; thence W. 38 ch's and 63 links, to the place of beginning, containing 912 acres, more or less, situate in the county of Polk and State of Oregon, to satisfy first an execution issued out of the circuit court of the State of Oregon, for the said county of Polk, upon a judgment rendered in said court on the 29th day of May,
140 A. D. 1873, in favor of S. W. Smith, and against the said Ezra Scovell, for the sum of $100 and 60 cents and interest thereon from the said 29th day of May, 1873, and cost of and accruing upon said execution. Also to satisfy an execution issued out of the said circuit court, upon a judgment rendered L. Vineyard, a justice of the peace in and for the precinct of Dallas, in said county and State, which said judgment was rendered in favor of Samuel Parker and against the said Ezra Scovell, on the 23d day of May, 1873, for the sum of $48.50, and to satisfy the further sum of $11.25 costs and disbursements thereon, and interest from the said 23rd day of May, 1873, together with the costs of and accruing upon said execution, which said judgment was duly assigned to the S. W. Smith, on the 13th day of July, 1873, and a transcript duly filed with the clerk of said county, and duly docketed in the judgment-docket of the said circuit court, prior to the issuance of said execution. Also to satisfy an execution issued out of the county court of the State of Oregon, for the county of Ma-
141, 142 rion, upon a judgment rendered in said court in favor of Mallory and Shaw, and against said Ezra Scovell, on the 7th day of July, 1873, for the sum of $50.00, and also to satisfy the further sum of $19.50 costs and disbursements thereon, and interest from the said 7th day of July, 1873, together with the costs of and accruing upon said execution, which said judgment was duly assigned to the said S. W. Smith, on the 5th day of August, 1873.

Dallas, August 9th, 1873.

S. T. BURCH,
Sheriff Polk County, Oregon.

143 At a term of the county court of the State of Oregon for the county of Marion, held at the court in Salem, in said county, on the 2nd day of February, 1874, and from day to day thereafter during *to* continuance of said term —

Prefent, the Hon. C. N. Terry, judge; Hon. , commissioners; and D. H. Murphy, clerk; L. S. Scott, sheriff—

Among other the following proceedings were had, to wit, on Tuesday, February 3rd, 1874.

RUFUS MALLORY AND J. J. SHAW, PARTNERS under the firm-name of Mallory and Shaw, pl'ffs,
vs.
EZRA SCOVELL, DEF'T.

Now, at this day, comes the above named pl'ffs in person, and as the att'ys of the purchaser, and moves the court for an order confirming the sale of real estate heretofore and on the 13th day of September, 1873, made by the sheriff of Polk County, Oregon, upon an execution issued out of the county court of the State of Oregon, for Marion
144 County, in the above-entitled cause, directed to the sheriff of Polk County, commanding him that, out of the personal property of the said def't, or, if sufficient personal property could not be found, then out of the real property belonging to said defendant in the county of Polk, that he satisfy the sum of $50.00 then due on the judgment rendered in the above-entitled cause, and the further sum of $19.55, and accruing costs.

And it appearing to the court that, by virtue of said execution, the sheriff of Polk County, for want of personal property belonging to said Ezra Scovell, judgment-debtor, duly levied upon all the right, title, and interest of said Ezra Scovell in and to the following-described real estate, to wit: Commencing seven chains and 70 links E. and 15 ch's and 50 links S. of the N. E. corner of section 16, in T. 7 S., R. 5 W. Willamette meridian; running thence N. 9 ch's; thence W. 87 ch's & 50 links; thence S. 49 ch's & 15 links; thence E. 47 ch's; thence S. 39 ch's & 85 links; thence E. 80 ch's; thence N. 80 ch's; thence W. 38 ch's & 63 links, to the place of beginning, containing 912 acres,
145 more or less, situate, lying, and being in the county of Polk and State of Oregon, and after advertising the same for sale by publishing a notice thereof for more than four successive weeks prior to the date of sale, and by posting like notices of the time and place of sale the same period of time, in four of the most public places in said county, in the manner prescribed by law, duly sold the same on Saturday, the 13th day of September, 1873, between the hours of 9 o'clock a. m. and 4 o'clock p. m. of said day, in front of the court-house door in said county of Polk, that being the time and place fixed for sale, to S. W. Smith, for the sum of $116.00, he being the highest bidder and that being the highest and best bid bidden therefor.

And it further appearing to the court that said sale was in all respects regularly and legally conducted, and that there were no irregularities in the proceedings concerning said sale, and no objection having been made or filed to the confirmation of said sale, it is therefore ordered, adjudged, and decreed that the said sa'e be, and the same hereby
146 is, in all respects confirmed.

C. N. TERRY,
County Judge.

In the county court for the county of Marion, State of Oregon.

STATE OF OREGON,
County of Marion, ss:

I, D. H. Murphy, clerk of said court, hereby certify that the foregoing transcript has been carefully compared with and is a true copy, and the whole thereof, of the original execution, and all notices connected therewith, including the confirmation of sale, as the same is on file and of record in the case of Mallory and Shaw, pl'ffs, and Ezra Scovell, defendant, now on file and in my office and custody.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 13th day of February, A. D. 1874.

[L. S.] D. H. MURPHY, *Clerk*,
By O. J. CARR, *Deputy*.

147 This indenture, made this 20th day of April, A. D. 1874, between S. T. Burch, sheriff of Polk County, in the State of Oregon, party of the first part, and J. H. Mitchell and J. N. Dolph, of Multnomah County, said State of Oregon, the parties of the 2nd part.

Whereas by virtue of a certain execution issued out of and under the seal of the county court of the State of Oregon, for Marion County, duly attested the 5th day of August, 1873, in the suit of R. Mallory and J. J. Shaw, pl'ffs, against Ezra Scovell, def't, directed and delivered to said sheriff, commanding him that of the goods and chattels of said def't he should cause to be made certain moneys in said execution specified, and, if sufficient goods and chattels could not be found, then he should cause the amount so specified to be made out of the real property which said def't, Ezra Scovell, had in or to the premises hereinafter described and conveyed, and on the 13th day of September, A. D. 1873, sold said premises at public auction to highest bidder at the court-house door
of said county, at the town of Dallas, in said Polk County, Ore-
148 gon, having first given public notice of the time and place of said sale by advertising the same according to law, at which sale said premises were struck off and sold to S. W. Smith for the sum of one hundred and sixteen dollars, he, said S. W. Smith, being the highest bidder and his said bid being the highest sum bidden for said property so sold, which said sale was afterwards and on the 3d day of February, 1874, by the said county court of the State of Oregon, for the county of Marion, in all respects duly confirmed;

And whereas within sixty days from the date of said confirmation, and on the 19th day of February, 1874, the said J. H. Mitchell and J. N. Dolph being law creditors of the said Ezra Scovell, defendant, and owners of a certain judgment and decree rendered on the 4th day of December, A. D. 1874, by the circuit court of the State of Oregon for Polk County, in a certain suit in said court pending, wherein said J. H. Mitchell and J. N. Dolph were plaintiffs and said Ezra Scovell was defendant, did in due form of law redeem said premises from said
149 sale, and now hold and own all the title acquired by the said S. W. Smith by virtue of said sale; and no other creditor of the said Ezra Scovell having made application to redeem said premises, and more than sixty days having elapsed since the redemption of said premises by said J. H. Mitchell and J. N. Dolph as aforesaid:

Now, therefore, this indenture witnesseth that the said party of the first part, by virtue of said execution, in pursuance of the statutes in such cases made and provided, and in consideration of the sum of one hundred and twenty-nine dollars, the receipt whereof is hereby acknowl-

edged, to me paid by said J. H. Mitchell and J. N. Dolph (being the amount of money for which said real property was sold by me as aforesaid, with interest thereon at the rate of two per cent. per month from the date of said sale), hath sold and conveyed, and by these presents does hereby sell, grant, bargain, and convey unto the said parties of the second part all the estate, right, title, and interest which the said
150 Ezra Scovell, defendant aforesaid, had on the said fifth day of August, A. D. 1873, or at any time thereafter of, on, or to all and singular the following piece, parcel, or tract of land situated in Polk County, State of Oregon, described as follows, to wit: Commencing seven (7) ch's and seventy (70) links east, and fifteen (15) chains and fifty (50) links south of the northeast corner of section sixteen (16) in township seven (7) south of range five (5) west of Willamette meridian; running thence north nine and half (9½) chains; thence west eighty-seven (87) chains and fifty (50) links; thence south forty-nine (49) chains and fifteen (15) links; thence east forty-seven (47) ch's; thence south thirty-nine (39) chains and eighty-five (85) links; thence east eighty (80) chains; thence north eighty (80) chains; thence west thirty-eight (38) chains and sixty-three (63) links, to the place of beginning, containing nine hundred and twelve (912) acres, more or less: To have and to hold all and singular the above mentioned and described and conveyed premises, with
151, 152 all and singular the improvements and appurtenances belonging thereto, unto the said J. H. Mitchell and J. N. Dolph, the parties of the second part, and their heirs and assigns forever.

In testimony whereof I, the said party of the first part, hereunto set my hand and seal this the day and year first above written.

[SEAL.] S. T. BURCH,
Sheriff of Polk County, Oregon.

In presence of—
JNO. J. DALY.
J. H. MYER.

STATE OF OREGON,
County of Polk, ss:

On this 20th day of April, 1874, before me, the undersigned, personally came S. T. Burch, sheriff of Polk County, Oregon, who is personally known to me to be the identical person who is named in the foregoing indenture, and acknowledged to me that he had executed said indenture as such sheriff, and for the uses and purposes therein set forth.

In testimony whereof I hereunto set my hand and seal the day above written.

[L. S.] JOHN J. DALY,
Notary Public.

Recorded May 1st, A. D. 1874.

D. J. HOLMES, *Recorder*,
By R. L. FRAKER, *Deputy.*

153 In the circuit court of the State of Oregon, for Polk County.

J. N. DOLPH, PL'FF & RESPONDENT,
vs.
HARLOW BARNEY & W. HOLMAN, DEF'TS & appellants.

STATE OF OREGON,
County of Polk, ss:

I, W. S. Frink, clerk in and for said county, and ex-officio clerk of the circuit court of the State of Oregon for Polk County, hereby certify that

the foregoing transcript is a true copy of the original roll or final record or the pleadings, orders, exceptions, papers, and journal-entries that constitute such roll or record, together with a copy of the notice of appeal in the above-entitled action; and that an undertaking has been filed herein by the appellants that they will pay all damages, costs, and disbursements that may be awarded against the said def't on the appeal; and also, if said judgment or any part thereof be affirmed, the appellant will pay the value of the use and occupation of such property, so
154 far as affirmed, from the time of the appeal until the delivery of the possession thereof, not exceeding the sum of ($1,000) one thousand dollars (the said Harlow Barney as principal and W. P. Holman and S. W. Smith are the sureties therein named):

And that I have prepared and compared the foregoing transcript with the said originals, and that the same is a true copy thereof, and of the whole of said originals, as appear of record and on file in my office and in my custody and keeping.

Witness my hand and the seal of said circuit court, affixed at office in Dallas, this 15th day of August, A. D. 1874.

[SEAL.] W. S. FRINK, *Clerk*,
By R. L. FRAKER, *Deputy*.

155, 156 (Indorsed:) Harlow Barney, appel., vs. J. N. Dolph, respondent. Transcript from circuit court Polk County. Filed Aug. 18th, 1874. C. G. Curl, cl'k, by W'm Waldo, dep't.

157 UNITED STATES OF AMERICA, *ss:*

To J. N. Dolph, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington City on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Oregon, wherein Harlow Barney is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable B. F. Bonham, chief justice, this 16th day of February, A. D. 1875.

B. F. BONHAM,
Chief Justice of the Supreme Court of the State of Oregon.

158 Service of the within citation admitted by delivery to me of a copy thereof on this 17th day of February, A. D. 1875.

E. C. BRONAUGH,
One of Att'ys of Record of J. N. Dolph.

(Indorsed:) Harlow Barney vs. J. N. Dolph. In error. Citation. Filed Feb'y 18th, 1875. C. B. Bellinger, clerk.

159 UNITED STATES OF AMERICA,
District of Oregon, ss:

The President of the United States of America to the supreme court of the State of Oregon and to B. F. Bonham, chief justice, P. P. Prim, John Burnett, E. D. Shattuck, and L. L. McArthur, justices of said court, greeting:

Because in the record and proceedings, as also in the rendition of the

judgment and decree in a plea which is in said supreme court and before the justices of the said supreme court, between Harlow Barney as plaintiff and J. N. Dolph defendant, manifest error hath happened, to the great damage of the said Harlow Barney, as aforesaid appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf:

160 You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and speedily, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington City on the second Monday of October next, in the Supreme Court there and then to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of February, A. D. 1875, and of the Independence of the United States the ninety-eighth.

In testimony whereof I, Ralph Wilcox, clerk of the circuit court of the United States for the district of Oregon, have hereunto set my hand and affixed the seal of said court, at Portland, in said district,

161 this 15th of February, A. D. 1875.

[SEAL.] RALPH WILCOX, *Clerk.*

(Indorsed:) Filed Feb. 15th, 1875. C. B. Bellinger, clerk supreme court, Oregon.

162 STATE OF OREGON,
County of Marion, ss:

I, C. B. Bellinger, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Salem, Oregon, this 26th day of May, 1875.

[SEAL.] C. B. BELLINGER, *Clerk,*
By L. F. WILLIAMS, *Deputy.*

(Indorsement on cover:) No. 309. Harlow Barney, plaintiff in error, vs. J. N. Dolph. Oregon sup. court. Filed 13th November, 1875.

Supreme Court of the United States.

HARLOW BARNEY, PLAINTIFF IN ERROR, vs. J. N. DOLPH, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The facts in this case which are material here are as follows:

John Waymire, a married man, settled upon and held 640 acres of land in Oregon, under section 4 of the Donation Act (9 Statutes, 496). He made his final proofs of residence and cultivation, as required by the 7th section of said act. On the 9th day of December, A. D. 1867, said Waymire and his wife Clarissa made a quitclaim deed of said 640 acres, for the consideration of one dollar, to M. S. Riggs. (Record, 32 and 33.) This was before the certificate or patent was issued, as required by the said 7th section. Clarissa, the wife, died, and subsequently the certificate and patent were issued. On the 18th day of August, 1873, and after said certificate and patent were issued, said John Waymire conveyed said 640 acres to Harlow Barney, plaintiff in error (Record, 27), and on the same day Mary Ann Waymire, daughter and heir of the said John and Clarissa Waymire, also conveyed her interest in said land to plaintiff in error. (Record, 26.) On the trial in the State circuit court, after the plaintiff there (Dolph), who claims title through the said deed of Waymire and wife, had submitted his evidence to the court and jury, the defendant there (Barney) offered in evidence, in support of his right to the property, the said two deeds of John and daughter Mary Ann Wayman; but they were ruled out by the court, to which ruling the de-

fendant Barney then and there excepted. The supreme court of the State affirmed this ruling of the circuit court.

ASSIGNMENT OF ERRORS.

Said supreme court erred in affirming the said ruling of the said circuit court and holding that the said two deeds of August 18, 1873, were inadmissible as evidence for plaintiff in error.

Second. Said court erred in holding that plaintiff in error acquired no right to or interest in said land by virtue of said two deeds or either of them.

Third. Said court erred in holding that the right or interest of the said Clarissa did not, upon her death, vest in her heirs, uuder and by virtue of said section 4 of said act.

Fourth. Said court erred in holding that the said deed of John Waymire and his wife Clarissa to M. R. Riggs defeated the investiture in her heirs upon her death of the right and interest acquired by said Clarissa in said land, under and by virtue of said section 4 of said act.

Fifth. Said court erred in rendering judgment for defendant in error.

ARGUMENT.

Section 4 of said act provides: "That there shall be, and is hereby, granted to every white settler or occupant of the public lands * * * the quantity of one section of 640 acres, one-half to himself, the other half to his wife, to be held by her in her own right, and the surveyor-general shall designate the part enuring to the husband and that to the wife and enter the same upon the records of his office, and in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant as above provided, whether under the late provisional government or since, *and either shall have died before patent issues*,

the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except when the deceased shall otherwise dispose of it, by testament, duly and properly executed according to the laws of Oregon: Provided, That all future contracts, by any person or persons entitled to the benefits of this act, for the sale of land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void."

Section 7 of said act, after providing as to final proofs and a certificate thereon by the surveyor-general, further provides that a patent shall issue in accordance with said certificate, if the Commissioner of the General Land-Office "*shall find no valid objection thereto.*"

Plaintiff in error claims that, as the wife of John Waymire died before certificate or patent, her husband and children, upon her decease, became entitled to her share or interest in said lands, notwithstanding the conveyance executed by her and her husband to Riggs.

No words can make this plainer than it is made by the words of the statute. There is no reason for rejecting the obvious meaning of these words, for the spirit of the law accords with its language. Congress not only intended, in these donations, to provide for the settlers upon the public lands of Oregon, but also for their families. Women and children are made the special subjects of its care. It is only necessary to give to the words of the statute their natural and ordinary meaning, to carry out the intention of Congress. That provision in said section giving the interest of the deceased to the survivor and children is a part of the *granting* clause of the statute. All rights under it are therefore necessarily held under and in accordance with that provision. Any title vested in the settler by said section is clearly a conditional or determinable title. Any purchaser from the settler takes nothing more than such a title. Suppose a settler, after residing upon and cultivating 640 acres under said section for 3½ years, makes a deed for the land, and before the expiration of the four years, abandons it—

such a deed, as to the title, is a nullity. So, if the husband gives a deed to half of the land, and subsequently the surveyor-general designates that half as the part enuring to the wife, such a deed, as to her title, is a nullity; and so, if a husband makes a deed and dies before patent, the deed is a nullity, because the statute under which he holds terminates with that event the interest which it had conferred upon him. Practically, the husband and wife take a life-estate in the donation-claim, with remainder over to the survivor and their children, if death happens before patent issues. Particular force is given to this idea by the exception in the granting clause of the section: When the husband or wife dies, his or her share goes to the survivor and children, "*except when the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon.*" Presumptively, a testament will make proper provision for children, and therefore it is allowed. No other disposition of the property, before patent, is permitted. Does not the express exception of a testament exclude the idea of a sale and deed? *Expressio unius est exclusio alterius.*

Several decisions have been made to the effect that the survivor and children take under said section 4, by *purchase*, and not by *descent*. Judge Deady, in Fields *vs.* Squares, Deady's Reports, 384, speaking of the rights, under said section, of the husband and children of Nancy Lownsdale, who died before patent, says: "The grant to Nancy took effect from the passage of the act. It was not an estate for life merely, but of inheritance; yet, by the terms of the grant, it was made liable to be determined by the happening of a particular event—her own death before the issuance of the patent. The estate granted her was therefore what the law calls a qualified or determinable fee, because, although it might have continued forever, and descended to her heirs *ad infinitum*, yet it was liable to be determined—terminated by the happening of this event, by which its continuance or extent was limited. This event actually happened, and in contemplation of it, the act limited the estate in Nancy's share

of the donation over to third persons in equal parts—her husband and children. Upon the determination of her estate in the land, the act in effect granted it over to those persons. Until this event, the husband and children had a contingent remainder in the land, which thereupon vested in them absolutely. This interest they took as direct donees of the United States by force of the grant, and not as heirs of Nancy, who left nothing for them to inherit, because her estate in the land terminated with her death. They were in by purchase, and not by descent. The husband and children derived their interest from the United States, and not from Nancy, and thererore there is no privity of estate between them."

That Waymire and children took the share of Mrs. Waymire upon her decease, by purchase and not by descent, is obvious, for the reason that, according to the law of descents her land would have gone to her children in equal proportions as her heirs, but by the said act of Congress it went to her husband and her children in equal proportions, thus making a distributee of one who was not her heir at law.

If Waymire and children took under or through Mrs. Waymire, then of course her deed to Riggs, if otherwise sufficient, would bind them; but it is perfectly clear that if they did not take under or through her, but directly from the United States under the act of Congress, her said deed did not affect their rights. If Mary Ann Waymire took as donee or grantee of the United States, then it is too plain for argument that there is no privity of contract between her and Riggs.

Mrs. Waymire had no power to divert the estate from the direction given to it by the grant. She was invested with a power of appointment by Congress and could give direction to the title by testament. This power she did not exercise. She could not control the title in any other way after her death. Congress, in the grant to her, directed where the title should go if she died intestate before patent. The will of Congress is paramount and plainly expressed.

But it is said that the words of the section, "shall be, and is hereby, granted," vests a title *in præsenti* in the husband and wife. This may be true, but it is a defeasible title, liable to defeat in various ways before patent. This defeasible title of the wife has been defeated by her death before patent, as provided in said section. Let it be observed that if the words "shall be, and is hereby, granted," vest a present defeasible title in the husband and wife, they also vest in the survivor and children before patent a present contingent title. When the act gives to the husband and wife a determinable fee, it also *uno flatu* gives to the survivor and children before patent a contingent remainder. This contingent remainder cannot be taken away without the consent of those entitled to it, otherwise than as provided by the act. There are two ways in which it can be defeated under the statute: First. By a testament duly executed. Second. By a patent issued before death. Neither of these contingencies have happened in this case.

Suppose Waymire and his wife had been in debt and their donation claim had been sold at sheriff's sale. Could the purchaser at such sale hold as against the children of Waymire and wife, if one or both had died before patent? To hold in favor of the purchaser in such a case would be not only to violate the letter but the obvious spirit of the statute. It is no answer to this argument for the children to say that the title comes through an act of Congress and that the patent is only evidence of title. On the contrary, because the title comes through the act, the argument is good, for their rights are a part of the statutory title. The same statute that creates the title of the husband and wife creates the title of the children. Both are subject to contingencies; when the patent issues all contingencies cease. This converts what was before a determinable or contingent into an absolute title.

But it will be said that section 2 of the act of July 17, 1854, (10 Statutes, 305,) makes valid and binding the deed of Waymire and wife to Riggs. That section simply repeals

the "*proviso*" to section 4 of the Donation act, by which all future contracts for the sale of the land held under that section are declared void, provided that no sale shall be deemed valid unless the vendor shall have resided four years upon the land.

The whole and only effect of this act of 1854 is to repeal the proviso in the 4 section of the Donation Act. Every portion and clause of said section otherwise is left untouched. The proviso in said act of 1854, that no sale shall be deemed valid until after four years' residence and cultivation, has no effect, and is simply declaratory of the law as it then stood. Necessarily, any sale under and by virtue of section 4 of the Donation Act, would be void before the end of four years' residence and cultivation.

Section 4 of the Donation Act is now to be construed as though the proviso as to contracts had never been inserted in it.

The repealing clause of the act of 1854 is *expressly* confined to the proviso in section 4 of the Donation Act. It cannot therefore be extended to other parts of said section by implication. A repeal by implication is not favored.

Henderson's Tobacco, 11 Wallace, 656.

Congress enacted two rules of property in section 4 of the Donation Act—one as to contracts; the other as to descents. Can an express repeal of the former be construed to repeal the latter by implication?

Leaving out the proviso repealed, and said section 4 of the Donation Act and section 3 of the act of 1854 can stand together.

They are no more repugnant to each other than is the clause in section 4 of the Donation Act, as to descents, with the preceding part of the same section, which grants title upon four years' residence and cultivation.

Attention is directed to section 7 of the Donation Act, which provides that a patent may issue in accordance with the certificate of the surveyor-general, if the Commissioner

of the General Land-Office "shall find no valid objection thereto." Manifestly, therefore, the question of title cannot be regarded as settled until a patent issues. The Commissioner can revise and set aside the decision of the surveyor-general.

Every purchaser before patent necessarily buys with uncertainty as to his title. Riggs not only purchased before patent but before a certificate was issued, and for aught that appears, before the surveyor-general had designated the part enuring to Mrs. Waymire. To hold that a mere quitclaim deed by the settler and his wife for the whole 640 acres, for the consideration of one dollar, made under such circumstances, estops their children, is to defeat the wise and just provision of the law for the family and heirs of the settler.

GEO. H. WILLIAMS,
For Plaintiff in Error.

No. 309.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HARLOW BARNEY,

PLAINTIFF IN ERROR.

VS.

J. N. DOLPH,

DEFENDANT IN ERROR.

Brief and Argument for Defendant in Error.

J. H. MITCHELL, *Attorney for Defendant in Error.*

PORTLAND, OREGON:
A. G. WALLING, STEAM PRINTER AND BOOKBINDER,
1878.

IN THE SUPREME COURT

OF THE

UNITED STATES.

HARLOW BARNEY,

Plaintiff in Error,

Vs.

J. N. DOLPH,

Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

I.

STATEMENT OF CASE.

This is an action of ejectment brought in the Circuit Court of the State of Oregon for Polk County, by defendant in error, who alleges in his complaint that he is the owner in fee simple of an undivided five-eighths of the premises described in the complaint, as tenant in common with J. H. Mitchell, who is the

owner of the remaining undivided three-eighths thereof, and that he is entitled to the immediate possession of the whole of said premises as against plaintiff in error, who wrongfully withholds possession thereof from him.

Record folios 2 and 3.

Plaintiff in error by his answer admits himself to be in possession of the whole of the lands in controversy, but denies that such possession is wrongful as to any part thereof. Denies that either defendant in error or Mitchell owns any portion of said land as tenants in common or otherwise; and for separate answer alleges that he (plaintiff in error) is the owner in fee of all of said land except 272 acres, the title to which is alleged to be in the State of Oregon. Also, that on February 21, 1874, the whole of said premises in controversy was duly sold by the Sheriff of Polk County for non-payment of the taxes of 1872, amounting to $83 20, and purchased by S. W. Smith, to whom the Sheriff gave a certificate, and that no redemption has been made from such sale.

Record folios 5 and 6.

Defendant in error by his reply denies each and every of the affirmative allegations of said answer.

Record folios 6 and 7.

A trial by jury was had upon the issues thus joined, which resulted in a verdict and judgment in favor of defendant in error.

Record folios 7, 8, 9, 10 and 11.

From which appeal was taken to the Supreme Court of the State, where the judgment of the Court below was affirmed.

Record folios 1 and 2.

From the judgment of the Supreme Court of the State of Oregon, a writ of error is brought to this Court.

The defendant in error produced and exhibited in evidence on the trial a perfect chain of title from the Government of the United States down to himself, and as part of his chain of title, read in evidence a patent from the Government to John Waymire and wife, under the act of Congress of September 27, 1850, commonly called the Donation Law, for a portion of the lands in controversy, bearing date, October 15, 1873, and next thereafter offered in evidence a deed from Waymire and wife to Milton S. Riggs, for the lands embraced in said patent, which deed bears date in 1867, to the admissibility of which deed counsel, for the plaintiff in error, objected, on the ground that it bore date prior to the date of said patent. To save the necessity of proof, counsel for the defendant in error here admitted that Mrs. Waymire, one of the donees in said patent, died prior to its date and prior to the issuance of the patent certificate upon which said patent is based, and counsel for plaintiff in error admitted in return that final proof of residence and cultivation upon the lands described in said patent by said donees, as required

by law, had been duly made and filed in the proper office before the death of Mrs. Waymire, whereupon the court overruled the objection of counsel for plaintiff in error, and allowed said deed to be read in evidence to the jury—to which ruling counsel for plaintiff in error excepted.

Record folios 20 and 21.

II.

ARGUMENT.

Numerous errors as grounds of appeal in the court below were alleged to exist in certain rulings of the court in the course of the trial, as to the admissibility of testimony and to a portion of the written instructions given by the court to the jury, but as this court will not examine questions other than the Federal question essential to the jurisdiction of the court, for the purpose of deciding whether the State court ruled correctly on them or not, (*Murdock vs. City of Memphis*, 20 Wall. 590.) I will confine myself to the examination of the Federal question.

This question is whether upon the death of the wife of a married settler, under Section 4 of the Act of Congress, entitled "An Act to create the office of Surveyor-General of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands." Approved September 27, 1850, commonly known in Oregon as the Donation Law—(9 Stat. 496,) who has completed the

residence and cultivation required by the Act and made proof thereof, the estate and interest of the donee terminates, and the same is vested by said Section in the surviving husband and children in equal parts, *unaffected by a conveyance of the same duly executed by her after the completion of residence and cultivation and final proof made*, or whether after such completion of residence and cultivation and making of final proof, she can not by a duly executed deed convey in fee simple her portion of the donation, although she might die before the issuing of the patent. The Circuit and Supreme Courts of Oregon decided that after completion of residence and cultivation, the wife of such a settler could convey her donation, and I maintain that the decision was not erroneous.

This precise question is now for the first time raised in this court, although the decision of this court in *Lamb vs. Davenport*, 18 Wall. 308, on principle and by analogy, must decide this case in favor of the validity of the wife's conveyance.

In that case this court held "that contracts of the husband concerning the equitable interest of the part of a donation claim allotted to him made *before the Act was passed*, are binding on the title which comes to his children by reason of a patent issued after the death of both husband and wife."

The portions of said Section 4, material to the present inquiry are as follows:

"SECTION 4. There shall be and is hereby granted to "every white settler or occupant of the public lands * * * "above the age of eighteen years being a citizen of the "United States * * * now residing in said territory, or "who shall become a resident thereof on or before the first "day of December, eighteen hundred and fifty, and who "shall have resided upon and cultivated the same for four "consecutive years and shall otherwise conform to the pro- "visions of this Act, the quantity of one half section or "three hundred and twenty acres of land if a single man, "and if a married man, or if he shall become married "within one year from the first day of December, eighteen "hundred and fifty, the quantity of one section or six hun- "dred and forty acres, one-half to himself, and the other "half to his wife to be held by her in her own right; and the "Surveyor-General shall designate the part enuring to the "husband, and that to the wife, and enter the same on the "records of his office; and in all cases where such married "persons have complied with the provisions of this Act, so "as to entitle them to the grant as above provided, whether "under the late provisional government of Oregon, or "since, and either shall have died before patent issues, the "survivor and children or heirs of the deceased shall be "entitled to the share or interest of the deceased in equal "proportions, except where the deceased shall otherwise "dispose of it by testament duly and properly executed "according to the laws of Oregon * * * *Provided further*, "That all future contracts by any person or persons en- "titled to the benefits of this Act, for the sale of the land "to which he or they may be entitled under this Act, before "he or they have received patent therefor shall be "void." * * *

By the 2d Section of the Act of Congress of July 17, 1854, (10 Stat. 306,) the above provisio of the 4th Section was repealed and in effect as was held by the Supreme Court of Oregon in the case at bar; *the sale of the donation was authorized after completion of the residence and cultivation.* That Section is as follows:

"SECTION 2. The provision to the 4th Section of the "Act of 27th of September, 1850 above mentioned, by "which all contracts for the sale of lands claimed under "that law before the issue of patents therefor, are declared "void, shall be and the same is hereby repealed. *Provided*, "That no sale shall be deemed valid unless the vendor "shall have resided four years upon the land."

I submit that the words of Section 4 of our Donation Law being "words of present grant" the title of the settler upon completion and proof of the residence and cultivation therein prescribed became complete. That the patent certificate, and patent when subsequently issued, simply invested the donee with the *evidence* of such previously complete and perfect title, and that consequently a deed executed by such donee after final proofs made, but before certificate or patent issued, was as effective to pass the fee simple title to the grantee, as is a deed executed by the donee subsequent to issuance of the patent.

Lee vs. Summers, 2 Oregon Rep. 260, 267.
Chapman vs. School Dist. No. 1, Deady's Rep. 113.
Groslouis vs. Northcut, 3 Oregon, 396, 399 and note.
Gringnon's Lessee vs. Astor, 2 How. 344.

Irvine vs. Smith, 3 Dallas, 465.
8 Op. Att.-Gen. 247.
9 Op. Att.-Gen. 42.
11. Op. Att.-Gen. 29.
Adams vs. Burk, 3 Sawyer, 419.
Lamb vs. Davenport, 1 Sawyer, 632.
Stark vs. Starrs, 6 Wall. 402.
Wythe vs. Palmer, 3 Sawyer, 412.

In the case of *Wythe vs. Palmer* cited above this precise question was presented. The case was tried before Mr. Justice Field and Deady District Judge. The court was divided in opinion upon the question; Mr. Justice Field holding: (I quote from the syllabus.)

"That where a married settler under Section 4 of the "Donation Act, has completed the residence and cultivation required by the Act and made proof thereof, he is "entitled to a patent for his donation and may convey the "same in fee simple."

In the case of *Adams vs. Burk* supra, tried also before Mr. Justice Field and Deady District Judge. Mr. Justice Field adhered to the same opinion, but decided the case on other grounds.

The able and lucid reasoning of Judge McArthur, who delivered the opinion of the Supreme Court of the State of Oregon in the case at bar, supported as it is by the authorities above cited, seems to lead inevitably to the conclusion arrived at by that court in this case, and to obviate the necessity of an attempt to lend additional strength to his position by any extended argument on my part, and I therefore present

that portion of the opinion relating to the question under consideration.

"Without dwelling upon the importance of the question "presented, further than to remark that it is one of the "most important that has ever arisen under the Donation "Act, we proceed at once to its discussion. In *Lee vs. "Summers*, 2 Oregon, 266, this court having under consid- "eration the rights of a donee of the United States under the "Act, held the words thereof to be words of present grant, "actually conveying the legal title to the premises, and "said: "When Congress grants lands in words, of present "grant, the legal title passes to the grantee. (13 Pet. "499. 6 Cranch, 128. 8 Id. 244. 2 Wheat. 198. 12 Pet. "454.) The cases just cited, show that the title vests im- "mediately in the donee; none the less because the title "vests in him conditionally, and subject to be defeated by "his failure to comply with the law, nor because the boun- "daries are yet to be determined" Some time prior to the "rendition of the opinion just cited the case of *Chapman "vs. School District No.* 1., arose in the United States "Circuit Court, and Justice Deady (1 Deady 113) in pass- "ing upon the character of the grant said: "The Donation "Law is a grant in the present, and gives the fee simple to "every settler who avails himself of its provisions from the "date of his settlement. (2 How. 76. 11 Opinion Attor- "ney-General 29.) True until the completion of the sub- "sequent conditions of residence, and cultivation and "proof thereof, it is an estate upon condition—what is "known at common law as a base or conditional fee, sub- "ject to be defeated or lost by a failure to perform the con- "ditions upon which it is held. But it is an estate in fee "nevertheless, and upon the completion of the residence

"and cultivation, or other conditions, it becomes absolute "and unqualified." In *Lamb vs. Davenport* (1 Sawyer "632) Justice Sawyer held the terms of the Act to be terms "of present grant, notwithstanding the grant itself was lia- "ble to be defeated by a failure to perform the conditions "subsequent."

"To the views of the character of the grant, as expressed "in the opinions referred to, we yield our full assent, and "hold the Donation Act to be a grant *in præsenti* of an "estate in fee, subject to be defeated by non-compliance "with the conditions subsequent therein expressed. Upon "the completion of the residence and cultivation required "by the 4th Section, the conditions of defeasance no longer "attached, and the estate from a base or qualified fee, "became a fee simple absolute, which by relation, must be "held to have had its inception at the date when the "donees first entered upon the land, with the intention of "complying with the requirements of the law."

"The title of John and Clarissa Waymire, in no way "depended upon the issuance of patent, for the issuance "thereof under this Act is a ministerial act, and the patent "itself mere evidence of title. Even if this were not so, "still their right to a patent having vested they must be "regarded as having the patent. *Stark vs. Starrs*, 6 Wall. "402."

"As against this position, counsel for appellant cite *Gib-* "*son vs. Chouteau*, 13 Wall. 102. In that case Justice "Field who delivered the opinion, quotes from the opinion "of the court in *Bagnell vs. Broderick*, 13 Pet. 450, as fol- "lows: 'Congress has the sole power to declare "the dignity and effect of titles emanating from the United "States; and the whole legislation of the Federal Govern-

"ment in reference to the public lands, declares the patent "the superior and conclusive evidence of legal title. Until "its issuance the fee is in the government, which by the "patent passes to the grantee, and he is entitled to recover "in ejectment.' Both these cases arose under an Act of "Congress of February 17, 1815, for the relief of the New "Madrid sufferers. In the 1st Section of that Act, it is "provided that those owning lands which were injured by "the earthquake of November 10, 1812, 'shall be and they "are hereby authorized to locate, etc.' (3 Stat. at Large "211.) Those words do not import a present grant, as do "the words 'there shall be, and hereby is granted etc.,' "in 4th Section of the Donation Act of September 27, "1850. (9 Stat. at Large 497.) While therefore we are not "disposed to question the correctness of the ruling in *Bag-* "*nell vs. Broderick*, or in *Gibson vs. Chouteau*, we do not "think that they are parallel cases to the one before us, nor "do we think that the patent is the superior and conclu- "sive evidence of legal title to lands granted under all "other acts of Congress. In *Wilcox vs. Jackson*, 13 Pet. "486, which arose under the pre-emption act of June 19, "1834 (4 Stat. at Large 687) Justice Barbour, having de- "cided that nothing but a patent passes a perfect and con- "sumate title, excepts from this general rule that class of "cases, where an act of Congress grants lands, as is some- "times done, in words of present grant. The Donation "Act must certainly be regarded as falling within the ex- "cepted class."

"Having reached the conclusion that the title vested by "virtue of the act, the question arises whether John and "Clarissa Waymire had power to alienate their estate. The "quit claim deed to Riggs was executed in 1867, long after "they had complied with the conditions of the Donation

"Act, and made due proof thereof, but before the issuance "of patent."

"Under the proviso in the 4th Section, all future con- "tracts for the sale of lands granted were declared void. "By the amendatory act of July 17, 1854, that proviso was "repealed, and since that time donees have had full power "of alienation in all cases where they had resided upon the "land for four years, and made the proper proof of resi- "dence and cultivation. The original and amendatory "acts being *in pari materia* must be construed together. "Hence, since the passage of the amendment of 1854, "where married persons have complied with the provisions "of the original act and either have died before patent "issues, the survivor and children, or heirs of the deceased, "are entitled to the share or interest of the deceased in "equal proportions, except where the deceased has other- "wise disposed of it by testament, or has alienated it by "deed duly executed according to law."

"Therefore the quit claim deed from John Waymire and "Clarissa his wife, to M. S. Riggs was executed at a time "when they had full power of alienation."

"In this connection it must be borne in mind that under "our Statute a deed of quit claim and release of the form "in common use, is sufficient to pass all the estate which a "grantor can lawfully convey by a deed of bargain and "sale. General Laws 516, Section 3."

"The bill of exceptions shows that the patent was issued "to John Waymire and wife. From the analogies of *Lamb* "*vs. Davenport* 18 Wall. 317, we are of opinion that as "the sale of Waymire and wife to Riggs was valid, it was "binding upon the title, which would otherwise have come "to her heirs by reason of her death."

I therefore respectfully submit that the judgment of the Supreme Court of the State of Oregon was correct and should be affirmed.

J. H. MITCHELL,
Att'y for Defendant in Error.